85-1038

No.

Supreme Court, U.S.
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In The
Supreme Court Of The United States

OCTOBER TERM, 1985

JOHN J. KELLY,
CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL.,
Petitioner,

v.

CAROLYN ROBINSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Did the Court of Appeals err in concluding that a criminal restitution order can constitute a dischargeable debt in bankruptcy?

LIST OF ALL PARTIES

In addition to petitioner John J. Kelly, Connecticut Chief State's Attorney, the other petitioners are: Director, Office of Adult Probation; Commissioner, Department of Income Maintenance; and Commissioner, Department of Administrative Services. The sole respondent is Carolyn Robinson.

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OPINION BELOW

The opinion of the United States Bankruptcy Court for the District of Connecticut, which was adopted by the United States District Court for the District of Connecticut, is reported at 45 B.R. 423 (Bankr. D. Conn. 1984), and is reprinted in Appendix A, pages 1A-6A. The bankruptcy and district courts relied heavily on their own opinion in In re Pellegrino, which is reported at 42 B.R. 129 (Bankr. D. Conn. 1984), and is reprinted in Appendix B, pages 7A-27A. The opinion of the United States Court of Appeals for the Second Circuit is not yet officially reported, but is reprinted in Appendix C, pages 28A-54A.

JURISDICTION

The United States Court of Appeals for the Second Circuit rendered its decision on October 29, 1985. No petitions for rehearing or requests for an extension of time within which to file a petition for certiorari were

filed. This Court has jurisdiction to review by writ of certiorari the judgment of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

A. Provisions of Title 11, United States Code

§ 101. Definitions

In this title-

(4) "claim" means--

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced

to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

(11) "debt" means liability on a claim;

§ 105. Power of Court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and

other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3), operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, or a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3), does not operate as a stay--

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a government unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt--

(1) for a tax or a customs duty--

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(6) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required--

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing--

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $500 for "luxury goods or services" incurred by an individual debtor on or within forty days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan

obtained by an individual debtor on or within twenty days before the order for relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act (15 U.S.C. 1601 et seq.);

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit--

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or other order of a court of record, or property settlement agreement, but not to the extent that--

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has

been assigned to the Federal Government or to a state or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a government unit, and is not compensation for actual pecuniary loss, other than a tax penalty--

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution, unless--

(A) such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

(9) to any entity, to the extent that such debt arises from a judgement or consent decree entered in a court of record against the debtor wherein liability was incurred by such debtor as a result of the debtor's operation of a motor vehicle while legally intoxicated under the laws or regulations of any jurisdiction within the United States or

its territories wherein such motor vehicle was operated and within which such liability was incurred; or

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965 (20 U.S.C. 1087-3), or under section 733(g) of the Public Health Services Act (42 U.S.C. 294f) in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is discharge-

able in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4) or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

§ 727 Discharge

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such

claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

B. Rule 17, Revised Rules of the Supreme Court of the United States. Considerations governing review on certiorari

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2 The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of ofl the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgements are reviewable by law on writ of certiorari.

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1 So in original.

STATEMENT OF THE CASE

This petition raises the question of whether a federal bankruptcy court has any authority to nullify a valid final judgment of a state criminal court and thus allow a convicted criminal, sentenced to make restitution, to escape justice by the simple expedient of listing the restitution order as a dischargeable debt on her bankruptcy petition.

The facts are not in dispute. See Appendix (App.) at 3A-4A, 30A-33A.[2] On July 28, 1980, the respondent pleaded guilty in Connecticut Superior Court to the crime of larceny in the second degree. See Connecticut General Statutes § 53a-123 (1979). The conviction arose out of the respondent's wrongful receipt of $9,932.95 in public assistance benefits from the petitioner Connecticut Department of Income

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2 The following statement of facts derives from the statement of facts contained in the Second Circuit and bankruptcy court opinions.

Maintenance (CDIM) while simultaneously receiving Social Security benefits. On November 14, 1980, a state Superior Court judge sentenced the respondent to a prison term of not less than one year nor more than three years, execution of which was suspended, and to probation for five years on the condition that she make restitution to the State of Connecticut in the amount of $9,932.95 at the rate of $100.00 per month, commencing January 16, 1981. A payment at that rate commencing at that time meant that the total amount that the respondent would have to restore over the five year probationary period amounted to $5,800.00.

On February 5, 1981, the respondent filed a voluntary petition for bankruptcy under Chapter 7 in the United States Bankruptcy Court for the District of Connecticut. See 11 U.S.C. § 701 et seq. The petition contained a schedule of creditors that listed, among others, CDIM as having a claim of $6,000 for public assistance and

the petitioner Connecticut Office of Adult Probation (COAP) as having a claim of $9,932.95 for restitution. On February 20, 1981, the bankruptcy court notified both CDIM and COAP of the respondent's Chapter 7 petition, but neither agency filed any form of objection to discharge by the April 27, 1981 deadline for doing so. On May 14, 1981, the bankruptcy court issued an order discharging the respondent from all dischargeable debts, declaring null and void all existing or future judgments that purported to hold the respondent personally liable with respect to any such dischargeable debts, and enjoining all creditors whose debts were thereby discharged from thereafter endeavoring to collect such debts.

After receiving her bankruptcy discharge on May 14, 1981, the respondent notified COAP of her intent to discontinue making payments and did in fact cease making them. The petitioner state agencies took no

action until February, 1984 when COAP wrote the respondent a letter requesting that she resume payment. The respondent replied by filing the present adversary proceeding in bankruptcy court against the Commissioner of CDIM, the Commissioner of the Connecticut Department of Administrative Services, the Director of COAP, and the Connecticut Chief State's Attorney. The respondent sought a declaration that the May 14, 1981 discharge order had discharged her restitution obligations to COAP and CDIM, an injunction prohibiting the named state officials from taking any steps to obtain further restitution payments, a finding that the state officials were in contempt of court, and an award of attorney's fees under 42 U.S.C. § 1988.

Following a brief trial on the merits, the bankruptcy court entered a Memorandum and Proposed Order denying all relief sought by the respondent. Relying on its decision in the companion case of In re Pellegrino,

42 B.R. 129 (Banker. D. Conn. 1984), the bankruptcy court concluded that a criminal restitution order does not constitute a bankruptcy "debt" within the meaning of 11 U.S.C. § 101(11) and that, even if it does, such a debt is a "penalty" and thus exempt from discharge under 11 U.S.C. § 523(a)(7). The district court adopted the proposed order and judgment entered for the state officials.

Upon appeal by the respondent, the United States Court of Appeals for the Second Circuit reversed and remanded. The court's opinion observed that a majority of the courts considering the issue have held that a criminal restitution obligation is not a debt under the Bankruptcy Code and that only one decision, In re Brown, 39 B.R. 820 (Bankr. M.D. Tenn. 1984), had held to the contrary. App. at 35A-36A, 38A. In adopting what was thus a minority rule, the Second Circuit relied on the fact that Congress had intended a broad meaning for

the word "debt," that the Code defined debt as a "right to payment," and that restitution created a right to payment since COAP had a right to receive and enforce payment of the restitution obligation. App. at 34A-43A, 45A-47A. The court explained that the Code's legislative history revealing Congress to have stated that "[t]he bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension," referred primarily to the exemption of criminal actions from the automatic stay, see 11 U.S.C. § 362(b)(1), not to the definition of "debt." App. at 43A-45A. The court added that the existence of the automatic stay exemption and of a specific exemption from discharge for fines and penalties, see 11 U.S.C. § 523(a)(7), demonstrated that "Congress drew such lines as it thought appropriate to grant or deny criminals the benefits of the bankruptcy laws," and that the majority line of cases had simply

"impermissibly reordered the priorities established by Congress." App. at 44A-45A. The court sought to distinguish four federal court of appeals cases that held or suggested that restitution is nondischargeable on the ground that in those cases the restitution obligation arose or would have arisen after bankruptcy and thus could not have constituted a "debt" under 11 U.S.C. § 727(b). App. at 41A-43A. Finally, the Court determined that the exemption from discharge in 11 U.S.C. § 523(a)(7) for a "penalty . . . payable to and for the benefit of a governmental unit . . . [that] is not compensation for actual pecuniary loss" did not apply. App. at 37A-42A. The Court reasoned that the phrase "not compensation for actual pecuniary loss" referred to obligations that were wholly non-compensatory and excluded those that were even partly compensatory. App. at 41A. Thus the Court could find that even though restitution represented a "penalty . . . payable

to and for the benefit of a governmental unit," it did not fit within the § 523(a)(7) exemption from discharge because it was at least partly compensatory in nature. App. at 41A-42A.

Judge Mansfield concurred in a separate opinion. App. at 53A-54A. He wrote that the court had reached an accurate but "unfortunate result." According to Judge Mansfield, the effect of the court's decision in many instances would be to "stultify and render useless criminal restitution payments as a means of punishing persons convicted of felonies." Judge Mansfield expressed his fear that "[t]he convicted criminal will simply use bankruptcy to escape the obligation to make criminal restitution payments ordered by the court." In closing, Judge Mansfield urged Congress to remedy "this unfortunate loophole" by amending 11 U.S.C. § 523(a)(7) to make criminal restitution payments non-dischargeable in bankruptcy.

REASONS FOR GRANTING THE WRIT

I. THE RULING OF THE COURT BELOW CREATES A CONFLICT AMONG THE CIRCUITS AND LOWER FEDERAL COURTS

In United States v. Carson, 669 F.2d 216, 217 (5th Cir. 1982), the Fifth Circuit found "untenable on its face" the notion that a prior discharge in bankruptcy of a debt created by the defendant's bank fraud prevented a federal criminal court from ordering the defendant, as a condition of his suspended sentence, to make restitution to the bank in the amount of its loss. On nearly identical facts, the Seventh Circuit reached the same conclusion. United States v. Alexander, 743 F.2d 472, 480 (7th Cir. 1980). The Third, Fifth, and Eleventh Circuits have all held that absent extraordinary circumstances a federal court should not enjoin state criminal proceeding that may result in a restitution order requiring the defendant to pay back a discharged debt,

In re Davis, 691 F.2d 176 (3d Cir. 1982), or a debt that may be discharged at the conclusion of pending bankruptcy proceedings. McDonald v. Burrows, 731 F.2d 294, 297-99 (5th Cir.), cert. denied, 105 S. Ct. 173 (1984); Barnette v. Evans, 673 F.2d 1250 (11th Cir. 1982).

The Second Circuit attempted to distinguish these decisions on the ground that the restitution orders there represented nondischargeable post-discharge debts under 11 U.S.C. § 727(b), whereas in the present case the restitution obligation arose well before bankruptcy.[3] This distinction is inaccurate with regard to the Fifth Circuit's ruling in McDonald v. Burrows, supra, and the Eleventh Circuit's ruling in Barnett v. Evans, supra. At the time that the debtor in those cases filed

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[3] The Second Circuit did not cite the Fifth Circuit's decision in McDonald v. Burrows, supra, but this decision is procedurally similar to the Eleventh Circuit's decision in Barnett v. Evans, supra, which the Second Circuit did cite.

his injunction action he had received neither a discharge nor a sentence of restitution and thus it was entirely possible that but for the court's decision restitution would have qualified as a dischargeable debt. See McDonald v. Burrows, 731 F.2d at 297-98; Barnette v. Evans, 673 F.2d at 1251. More importantly, not one of the five Courts of Appeals cases cites § 727(b) or otherwise limits its decision to restitution imposed after discharge. Rather, the suggestion in these cases is that Congress never had any intention of allowing for the discharge of criminal restitution, whenever imposed. See, e.g, United States v. Alexander, 743 F.2d at 480 ("The bankruptcy proceeding is largely unconcerned with criminality.")' Barnette v. Evans, 673 F.2d at 1251 ("The purpose of bankruptcy is to protect those in financial, not moral, difficulty"); United States v. Carson, 669 F.2d at 217 n.1 ("Deciding as we do that Carson's position does not make sense, we

conclude that Congress could not have endorsed it"). The Second Circuit's decision thus stands in conflict with the approach taken in these Court of Appeals cases. And as the Second Circuit itself acknowledged, its decision that restitution is a debt also conflicts with the explicit contrary holding reached by nearly every federal bankruptcy court to have addressed the matter. This Court should grant certiorari to resolve the conflict. See Rule 17.1(a), Revised Rules of the Supreme Court of the United States.

II. THE COURT OF APPEALS HAS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE AND THE RELATIONSHIP BETWEEN FEDERAL AND STATE GOVERNMENTS, AND THIS QUESTION HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Reduced to its essential, the question in this case is whether Congress in enacting the Bankruptcy Code intended to create what Judge Mansfield labeled an "unfortunate loophole" through which convicted criminals

could escape. The case also represents a sequel to Ohio v. Kovacs, 105 S. Ct. 705 (1985), in which this Court held that the monetary costs of a state-obtained injunction that required a debtor to clean up a hazardous waste site constituted a debt in bankruptcy. The resolution of these issues will have a significant impact on the ability of federal and state governments to fashion punishment that meets the crime. See Brief of Amicus Curiae in Support of Petition.

1. The Court of Appeals has decided an issue of federal law in a way that thwarts expressed public policy regarding the criminal justice system and the relation between state and federal governments. The inquiry involved is one of statutory construction. Regretably the Court of Appeals made little mention of the applicable rules. The task of a federal court is "to interpret the words of . . . statutes

in light of the purposes Congress sought to serve." Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979). A court must attempt to "ascertain the congressional intent and give effect to the legislative will." Philbrook v. Glodgett, 421 U.S. 707, 713 (1975). "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternate interpretations consistent with the legislative purpose are available." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982).

The Bankruptcy Code defines "debt" as a "liability on a claim," 11 U.S.C. § 101(11), and a "claim," in pertinent part, as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(4)(A). The other provision at stake is 11 U.S.C. § 523(a)(7), which creates an

exemption from discharge for debts "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." The Court of Appeals erred in concluding that a criminal restitution order represents a mere debt to a probation department and that § 523(a)(7) means that if a debt is merely partially as opposed to primarily "compensation for actual pecuniary loss," then it is not exempt from discharge. Although it is true that Congress intended a broad meaning for the word "debt," a restitution order bears little resemblance to the ordinary debt. A probation department, of course, has in the first instance a "right to payment" of the restitution order, but a probation department does not set the amount of the obligation, it cannot assign the obligation, and it does not retain the payments. App. at 12A. Nor is restitution mere "compensation for actual pecuniary loss." The accepted theory is that

an order of probation, of which restitution constitutes a condition, is "an authorized mode of mild and abmulatory punishment . . . intended as a reforming discipline." Korematsu v. United States, 319 U.S. 432, 435 (1943). Restitution, moreover:

> undoubtedly serves traditional purposes of punishment. The prospect of having to make restitution adds to the deterrent effect of imprisonment and fines, penalties that might seem to some offenders less likely to be imposed than restitution. Restoring the victim's property also serves the legitimate penal purpose of vindicating society's interest in peaceful retribution. Finally, restitution can be a useful step toward rehabilitation.

United States v. Brown, 744 F.2d 905, 909 (2d Cir.), cert. denied, 105 S. Ct. 599 (1984). "While recompense to the victim is a usually laudable consequence of restitution, the focus of any probation regimen is on the offender." United States v. Carson, 669 F.2d at 217.

Even if these points do not in themselves establish the conclusion that the court below misinterpreted the Bankruptcy Code, that conclusion becomes apparent upon application of the governing rules of statutory construction. Indeed, the position adopted by the Court of Appeals clashes frontally with the purposes Congress sought to serve in enacting the Bankruptcy Code. Chapman v. Houston Welfare Rights Organization, supra. Congress made clear in the Code's legislative history that "[t]he bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension. Thus criminal actions and proceedings may proceed in spite of bankruptcy." 1978 U.S. Code Cong. & Ad. News 5837. While as the court below pointed out, this language refers in the first instance to the automatic stay exemption in 11 U.S.C. § 362(b)(1), it cannot be reasonably assumed that Congress sought to exempt criminal proceedings from the automatic stay

and at the same time provide for the partial nullification of criminal proceedings by discharge of a restitution order. Discharge of a criminal restitution order, moreover--an order imposed after a court has found a person guilty of a crime beyond a reasonable doubt--has little to do with the goal of providing distressed debtors "relief from financial over-extension." The interpretation of the Code that most closely furthers the purposes Congress expressly sought to serve is that restitution and criminal fines are not debts at all or, if they are, then the phrase "not compensation for actual pecuniary loss" refers to the primary purpose of the obligation, so that restitution, even if a debt, would at least remain exempt from discharge under 11 U.S.C. § 523(a)(7).

Such an interpretation is also consistent with the general doctrine in public policy, enunciated in Younger v. Harris, 401 U.S. 37 (1971), that federal

courts, including bankruptcy courts, should not interfere with criminal prosecutions in the states. See Barnette v. Evans, 673 F.2d at 1251-52. The Younger notion of "comity" comprises "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." 401 U.S. at 44. Accordingly, "the National Government, anxious through it may be to vindicate and protect federal rights and federal interests, [should] always endeavor[] to do so in ways that will not unduly interfere with the legitimate activities of the States. Id. In this case, the interpretation lent the Bankruptcy Code by the Court of Appeals dramatically compromises the objectives of the Younger doctrine by allowing a federal bankruptcy

court to nullify the enforcement of a valid final judgment of a state criminal court. See Huffman v. Pursue, Ltd., 420 U.S. 592, 599 (1975) (Younger applies to attempts to enjoin enforcement of state civil nuisance judgment). One cannot easily imagine that this result "give[s] effect to the legislative will," Philbrook v. Glodgett, supra, or that it reflects, in the words of the Court of Appeals, the "priorities established by Congress."[4]

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[4] The Younger doctrine does not, of course, leave a debtor helpless in the occasional case in which the animus of the state prosecution is "neither punishment nor a sense of public duty, but rather [a desire] to obtain payment of a dischargeable debt either by an order of restitution or by compromise of the criminal charge upon payment of the civil obligation . . . ." In re Taylor, 16 B.R. 323, 326 (Bankr. D. Md. 1981). In such a case the debtor can normally challenge the bona fides of the prosecution in state court, as the Third and Eleventh Circuits have explained. In re Davis, 691 F.2d at 178; Barnette v. Evans, 673 F.2d at 1252. But if state remedies are ineffective or it is evident that the state prosecution is brought in bad faith or for purposes of harassment, In re Davis, 691 F.2d at 178, then a bankruptcy court can and should assume jurisdiction pursuant to 11 U.S.C. § 105(a) and enjoin the participants in the state prosecution. Id. at 177 & n.5; In re Wise, 25 B.R. 440, 441-42 (Bankr. E.D. Va. 1982).

Finally, the interpretation lent the Code by the court below produces decidely absurd results, Griffin v. Oceanic Contractors,Inc. supra, as the concurring opinion essentially acknowledges. The Court's decision allows for the growth of a revolving door system of justice whereby a defendant convicted of a crime in state criminal court can merely walk across the street to federal bankruptcy court and escape justice. Surely Congress did not intend such a result.

The respondent may argue that the state's remedy is to file a timely objection to discharge pursuant to 11 U.S.C. § 523(a), which the state did not do in this case. This proposal has little to commend it. As a general matter, when a state court has already adjudicated an individual guilty of a crime beyond a reasonable doubt, the state should not then have to shoulder the added burden of going into federal court to see that the individual does not escape punish-

ment. Cf. Imbler v. Pachtman, 424 U.S. 409, 425 (1976) ("if the prosecutor could be made to answer in court each time...a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.") Any such proposal, moreover, would merely narrow the existing loophole without eliminating it. Although an exception to discharge exists for debts created by "wilful and malicious injury by the debtor to another entity or to the property of another entity," 11 U.S.C. § 523(a)(6), no exception exists that would prevent the discharge of restitution in cases involving valid state crimes such as reckless burning, see Conn. Gen. Stat. § 53a-114 (1985), or negligent assault with a deadly weapon. See Id. § 53a-61(a)(3) (1985). Thus the respondent cannot advance an argument that the Code, as interpreted by the Second Circuit,

embodies a rational scheme that would consistently prevent the discharge of criminal restitution.

Nor is the answer merely to repair to Congress, as suggested by the concurring opinion. Inevitably Acts of Congress will lend themselves to strained interpretations that produce irrational results. The remedy in such instances is not reflexively to appeal to Congress for new legislation, but rather to apply the already existing rules of statutory construction that preclude reliance upon absurd interpretations, Griffin v. Oceanic Contractors, Inc., supra, and that proscribe the adoption of results in conflict with underlying statutory objectives. Chapman v. Houston Welfare Rights Organization, supra. The Court of Appeals erred by failing to apply these rules and, consequently, by interpreting the Bankruptcy Code in a way that thwarts important public policy regarding federalism and the administration of criminal justice.

This Court should accordingly grant certiorari. See Rule 17.1(c), Revised Rules of the Supreme Court of the United States.

2. This case also represents a sequel to this Court's recent decision in Ohio v. Kovacs, supra, which held that the monetary costs of a state-obtained injunction that required a debtor to clean up a hazardous waste site constitute a bankruptcy debt. Although the Court of Appeals did not rely on Kovacs, citing the case only for the proposition that the Code's definition of debt is "broad," App. at 38A, it is well to note that Kovacs does not at all mandate the result reached below. The Kovacs question of whether a bankruptcy debt arises when the state exercises its civil injunctive powers has little to do with the question here of whether a bankruptcy debt also arises when a state seeks to further its "'legitimate and compelling state interest' in protecting the community from crime.'" Schall v. Martin,

104 S. Ct. 2403, 2410 (1984). See also Younger v. Harris, 401 U.S. at 55 n.2 (Stewart, J., concurring) ("A State's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law."). Indeed, the Kovacs Court attempted to make clear that its holding did not extend to criminal cases:

> It is well to emphasize what we have not decided. First, we do not suggest that Kovacs' discharge will shield him from prosecution for having violated the environmental laws of Ohio or for criminal contempt for not performing his obligations under the injunction prior to bankruptcy. Second, had a fine or monetary penalty for violation of state law been imposed on Kovacs prior to bankruptcy, § 523(a)(7) forecloses any suggestion that his obligation to pay the fine or penalty would be discharged in bankruptcy.

105 S. Ct. at 711. Although this language extends literally only to fines and penalties and implicitly treats them as nondischargeable debts under § 523(a)(7) rather than as nondebts under § 101(11), it

nonetheless plainly indicates this Court's view of the Bankruptcy Code as having minimal application to criminal judgments--a view apparently not shared by the Second Circuit. This Court should grant certiorari to address the criminal law questions not presented by the facts in Kovacs. See Rule 17.1(c), Revised Rules of the Supreme Court of the United States.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

JOHN J. KELLY,
CONNECTICUT CHIEF
STATE'S ATTORNEY
DIRECTOR, OFFICE OF
ADULT PROBATION
COMMISSIONER, DEPARTMENT
OF INCOME MAINTENANCE
COMMISSIONER, DEPARTMENT
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General
State of Connecticut

No.

In The

Supreme Court Of The United States

OCTOBER TERM, 1985

JOHN J. KELLY,
CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL.,
Petitioner,

v.

CAROLYN ROBINSON,
Respondent.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re CAROLYN ROBINSON, Debtor	Chapter 7 Case No. 5-81-00114
CAROLYN ROBINSON, Plaintiff v. DIRECTOR, OFFICE OF ADULT PROBATION; AUSTIN J. MCGUIGAN, CHIEF STATE'S ATTORNEY, DIVISION OF CRIMINAL JUSTICE OF THE JUDICIAL DEPARTMENT; COMMISSIONER, DEPARTMENT OF INCOME MAINTENANCE; COMMISSIONER, DEPARTMENT OF ADMINISTRATIVE SERVICES, Defendants	Adv. No. 5-84-0063

APPEARANCES

Francis X. Dineen, Esq.	: Attorneys for
Joanne S. Faulkner, Esq.	: Plaintiff
New Haven Legal Assistance	:
Association, Inc.	:
399 Temple Street	:
New Haven, CT	:

Edward F. Reynolds, Esq. Assistant Attorney General State of Connecticut 90 Brainard Road Hartford, CT	: Attorney for : Defendants : Commissioner, : Department of : Income Maintenance : and Commissioner : of Administrative : Services, Bureau of : Collection Services
Carl Schuman, Esq. Assistant State's Attorney Office of Chief State's Attorney 100 South Turnpike Road Wallingford, CT	: Attorney for : Defendants : Austin J. McGuigan, : Chief State's : Attorney : Division of Criminal : Justice : Judicial Department : and Director, Office : of Adult Probation

MEMORANDUM AND PROPOSED ORDER

Alan H. W. Shiff, Bankruptcy Judge

The plaintiff-debtor, Carolyn Robinson, brought this action to determine, *inter alia*, the dischargeability of an order of restitution entered by the Superior Court of the State of Connecticut as a condition of probation in connection with the plaintiff's conviction for larceny in the second degree.

BACKGROUND

On July 28, 1980, the plaintiff pleaded guilty to larceny in the second degree in violation of Connecticut General Statute § 53a-123.[1] The conviction arose out of the plaintiff's wrongful receipt of public assistance benefits in the amount of $9,932.95. On November 14, 1980, the Connecticut Superior Court sentenced the plaintiff to a prison term of not less than one year nor more than three years, execution of which was suspended and the plaintiff was placed on probation for five years on the condition that she make restitution in the amount of $9,932.95 to the State of Connecticut at the rate of $100.00 per month, commencing January 16, 1981.[2]

On February 5, 1981, the plaintiff filed a Chapter 7 petition in this court and listed as unsecured creditors on Schedule A-3, the State of Connecticut Department of Income Maintenance on a claim of $6,000.00 for public assistance for the years 1973-1976 and the Office of Adult Probation on a claim of $9,932.95 for the November 14, 1980 restitution order. The plaintiff obtained a discharge by the May 14, 1981 order of this court.

On March 26, 1984, the plaintiff filed an amended complaint, which is the subject of this action, seeking in the

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[1] *State of Connecticut v. Robinson*, Docket No. CR6-185844.

[2] It should be noted payment of $100.00 per month commencing on January 16, 1981, would reduce her restitution payment to $5,800.00 if all payments were made.

First Count, a determination that the restitution obligation is a dischargeable debt which had been discharged on May 14, 1981. The Second Count alleges that the defendants' efforts to collect the restitution since her discharge on May 14, 1981, "are in violation of this Court's action discharging the debtor, and of this Court's action discharging the debtor, and of 11 U.S.C. secs. 524 and 525."[3] The plaintiff alleges in the Third Count that the actual or threatened actions of the defendants "are depriving plaintiff of her civil rights, privileges, immunities under color of state law, in violation of 42 U.S.C. sec. 1983."[4]

The plaintiff seeks the following relief from this court:

1. an order declaring that the larceny debt[5] , for which she was convicted, and the "restitution debt", ordered by the state court, are dischargeable and have been discharged;

2. an order enjoining the defendants from taking any steps to obtain payment of the restitution or otherwise enforcing the criminal judgment;

3. an order assessing attorney's fees and costs against

---

[3] Amended Complaint ¶ 18.

[4] Amended Complaint ¶ 19.

[5] Since the defendants failed to file a complaint to determine the dischargeability of the larceny debt, that debt was discharged under Code § 523(c) prior to the commencement of this action. Therefore the plaintiff's claim for relief in the form of an order declaring the larceny debt discharged when it has already been discharged by operation of law will not be considered in this decision. To the extent that the plaintiff's complaint may be read to include a claim for attorney's fees and other relief in connection with the larceny debt, those claims will likewise be excluded from consideration in this decision. There was no evidence that any of the defendants asserted a claim or attempted to collect the larceny debt at any time.

the office of Adult Probation pursuant to this court's equitable powers and 42 U.S.C. § 1988 payable to New Haven Legal Assistance Association;

4. appropriate orders for contempt and violation of the plaintiff's civil rights, including compensatory damages, punitive damages, and attorney's fees; and

5. such other further relief as this court deems just and fair.[6]

DISCUSSION AND ORDER

The facts in this proceeding, the issues raised, and the relief sought by the plaintiff are virtually identical to those in *In re Pellegrino,* Adv. No. 5-83-0554 (Bankr. D. Conn. July 25, 26, 1984) (appeal pending). A copy of this court's July 25, 1984 Memorandum of Findings, Conclusions of Law and Proposed Order and the July 26, 1984 order of the District Court, Daly, C.J. in *Pellegrino* are attached hereto. Accordingly, the following legal conclusions, reached in *Pellegrino,* are adopted to the facts here.

1. The state court's order that the plaintiff make restitution to the State of Connecticut of $9,932.95 as a condition of probation following the plaintiff's larceny conviction did not create a "debt" as defined in Code § 101(11). Therefore the plaintiff's obligation to pay restitution was unaffected by this court's May 14, 1981 discharge order.[7]

2. Assuming *arguendo* that the state court's order of restitution did not create a "debt" within the purview of the Bankruptcy Code, such a debt is a "penalty" and therefore excepted from discharge under § 523(a)(7).[8]

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[6] Amended Complaint p. 5.

[7] *In re Pellegrino,* Memorandum and Order, July 25, 26, 1984, at 5-10.

[8] *In re Pellegrino, supra,* at 13-19.

ORDER

For the foregoing reasons, the obligation created by the state court restitution order was not discharged by the May 14, 1980 discharge order of this court, the plaintiff is not entitled to the injunctive relief, damages, costs, attorney's fees and other relief claimed in her amended complaint and judgment may enter accordingly.

Dated at Bridgeport, this 31st day of August, 1984.

(sig.)

Alan H. W. Shiff
United States Bankruptcy Judge

It is So ORDERED.

Dated at Bridgeport, this 4th day of September, 1984.

(sig.)

T. F. Gilroy Daly
Chief Judge, United States District Court

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re

LOUIS PASQUALE PELLEGRINO and
FLORENCE ANN PELLEGRINO,

Debtors

Chapter 7
Case No. 5-83-00361

LOUIS PASQUALE PELLEGRINO and FLORENCE ANN PELLEGRINO,

Plaintiffs

v.

Adv. No. 5-83-0554

DIVISION OF CRIMINAL JUSTICE, CHIEF STATE'S ATTORNEY FOR THE J.D. OF NEW HAVEN, JUDICIAL DEPARTMENT;
DIRECTOR, OFFICE OF ADULT PROBATION;
COMMISSIONER, DEPARTMENT OF INCOME MAINTENANCE;
COMMISSIONER OF ADMINISTRATIVE SERVICES, BUREAU OF COLLECTION SERVICES,

Defendants

APPEARANCES

Francis X. Dineen, Esq. : Attorneys for
Joanne S. Faulkner, Esq. : Plaintiff
New Haven Legal Assistance :
Association, Inc. :
399 Temple Street :
New Haven, CT :

Edward F. Reynolds, Esq. Assistant Attorney General State of Connecticut 90 Brainard Road Hartford, CT	: Attorney for : Defendants : Commissioner, : Department of : Income Maintenance : and Commissioner : of Administrative : Services, Bureau of : Collection Services
Carl Schuman, Esq. Assistant State's Attorney Office of Chief State's Attorney 100 South Turnpike Road Wallingford, CT	: Attorney for : Defendants : Division of Criminal : Justice and Director, : Office of Adult : Probation

MEMORANDUM AND PROPOSED ORDER

Alan H. W. Shiff, Bankruptcy Judge

The plaintiffs, debtors, brought this action to determine, *inter alia*, the dischargeability of an order of restitution entered by the Superior Court of the State of Connecticut for the Judicial District of New Haven as a condition of probation in connection with a larceny conviction of the debtor Florence Pellegrino.

I.
BACKGROUND

On June 30, 1982, Florence Pellegrino was arrested for larceny in the second degree for fraudulently obtaining food stamps in the amount of $15,960.00 in violation of Connecticut General Statutes §§ 17-83i and 53a-123. Pellegrino pleaded guilty to the charges, and on October 29, 1982, she was sentenced to a two year prison term.[1] Execution of the prison term was suspended, and Pellegrino was placed on probation for five years on the condition that she make restitution in the amount of $15,960.00 to the State of Connecticut. At the sentencing, Pellegrino and her husband, Louis, pleaded for probation as an alternative to incarceration and suggested that restitution be paid out of Louis Pellegrino's wages. A wage execution was thereafter ordered in the amount of $40.00 per week. Because the parties have treated the wage execution as a part of the so-called restitution debt, this court will adopt that view.

On April 14, 1983, the plaintiffs filed a voluntary joint petition in this court under Chapter 7 of the Bankruptcy Code. Each of the plaintiffs listed the defendants State of Connecticut Department of Income Maintenance, Bureau of Collection Services and Office of Adult Probation as unsecured creditors on their Schedule A-3.[2] The plaintffs ob-

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[1] *State of Connecticut v. Florence Pellegrino*, docket No. CR6-207900.

[2] It should be noted that although paragraph 4 of each count of the plaintiffs' Amended Complaint alleges that "a debt to the (continued)

tained a discharge by the August 26, 1983 order of this court.

On February 7, 1984, the plaintiffs filed an amended complaint, seeking, in the First Count, a determination that the restitution order of the state court is a dischargeable debt which had been discharged by the order of this court. The Second Count alleges that the defendants violated the automatic stay provided by Code § 362(a) when they "continued to enforce the wage execution and collect amounts from Mr. Pellegrino's pay pursuant to the restitution order."[3] The plaintiffs further allege that the continued acceptance of money from Louis Pellegrino's wages "and any effort defendants may make to enforce the restitution order is in violation of this Court's order discharging the debtors and of 11 U.S.C. §§ 524 and 525."[4] The plaintiffs allege in the Third Count of their Amended Complaint that the actions of the defendants "have deprived and are depriving the plaintiffs of their civil rights, privileges, or immunities under color of state law" in violation of the Civil Rights Act, 42 U.S.C. § 1983.[5]

The plaintiffs seek the following relief from this court:[6]

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[2] continued
State of Connecticut Department of Income Maintenance, the Bureau of Collection Services, and the Adult Probation Department" was "duly scheduled", Schedule A-3 of the plaintiffs' petition lists those three creditors and an "AFDC" claim, estimated at $65,000.00 for the years 1969-1983. That was the only claim attributed to the defendants in their schedules. The "restitution debt" of $15,960.00, which is the subject of this proceeding, was not listed. Since, however, the defendants received notice of this Chapter 7 case as scheduled unsecured creditors, the "restitution debt" was not excluded from discharge under Code § 523(a)(3).

[3] Amended Complaint ¶ 11.

[4] Amended Complaint ¶ 12.

[5] Amended Complaint ¶ 13.

[6] Amended Complaint p. 4.

1. an order declaring that the larceny debt[7], for which Pellegrino was convicted, and the "restitution debt", ordered by the state court, are dischargeable and have been discharged;

2. an order enjoining the defendants from taking any steps to obtain payment of the restitution or otherwise enforcing the criminal judgment;

3. an order enjoining the defendants from continuing the wage execution on Louis Pellegrino's wages;

4. an order assessing attorney's fees and costs against the defendants pursuant to this court's equitable powers and 42 U.S.C. § 1988, payable to New Haven Legal Assistance Association;

5. appropriate orders for contempt and violation of the plaintiff's civil rights; and

6. such other and further relief as this court deems just and fair.

[7] Since the defendants failed to file a complaint to determine the dischargeability of the larceny debt, that debt was discharged under Code § 523(c) prior to the commencement of this action. Therefore the plaintiffs' claim for relief in the form of an order declaring that the larceny debt was discharged, when it has already been discharged by operation of law, will not be considered in this decision, and to the extent that the plaintiffs' complaint may be read to include a claim for attorney's fees and other relief in connection with the larceny debt, those claims will likewise be excluded from consideration in this decision. There was no evidence that any of the defendants asserted a claim or attempted to collect the larceny debt at any time.

II.
DISCUSSION

A.
IS RESTITUTION A DEBT?

Bankruptcy Code § 101(11) provides that the word "debt" means "liability on a claim." "Claim" is defined in § 101(4) as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." A "creditor," under § 101(9) is an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."

Under Connecticut's penal code, restitution is one of nine conditions of probation enumerated in Conn. Gen. Stat. § 53a-30. Criminal defendants ordered to make restitution by the court send their payments to the Connecticut Office of Adult Probation which is responsible for monitoring compliance with the court's order of restitution. Conn. Gen. Stat. § 53a-30(b). The crime victim receives payments from the Office of Adult Probation. Under the penal code, a victim cannot enforce a court's order of restitution if the criminal defendant fails to make payments to the Office of Adult Probation. The state court may, however, issue a warrant for the arrest of the criminal defendant for violation of a condition of probation. Conn. Gen. Stat. § 53a-32. Since a crime victim has no "right to payment," restitution is not a "debt" under Bankruptcy Code § 101(11). *Accord, In re Johnson*, 32 B.R. 614 (Bankr. D. Col. 1983) (applying Colorado law); *In re Magnifico*, 21 B.R. 800, 9 B.C.D. 670 (Bankr. D. Ariz. 1982) (applying Arizona law); *In re Button*, 8 B.R. 692, 7 B.C.D. 307 (Bankr. W.D. N.Y. 1981) (applying New York law). *Compare In re Newton*, 15 B.R. 708, 8 B.C.D. 522 (Bankr. N.D. Ga. 1981) *aff'd*, No. C81-2170A (N.D. Ga. May 24, 1982). (where the bankruptcy court held that an order of restitution is a debt in Georgia where state law provides

that "a restitution order shall be enforceable as a civil judgment by execution.")

Furthermore, the relationship in this proceeding between the criminal defendant and her victim lacks other typical attributes of a debtor-creditor relationship. Unlike an obligation which arises out of a contractual statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose.

As noted, Pellegrino was prosecuted, convicted and sentenced to two years in prison. Acting under the authority of Conn. Gen. Stat. § 53a-28, the state court suspended Pellegrino's prison term and placed her on probation. Using its wide discretion in setting conditions of probation, *State v. Pilch*, 35 Conn. Supp. 536, 539, 394 A.2d 1364 (1977), the court ordered Pellegrino to make restitution to the State of Connecticut. In ordering restitution under Conn. Gen. Stat. § 53a-30(a)(4), the court fixed the amount she had to pay and the manner of payment. Clearly the plaintiff's payments to the Office of Adult Probation are not a debtor's payments to a creditor. The obligation here arose from a court ordered sanction following a criminal conviction. The fact that the victim is an incidental beneficiary of that process does not alter the basic relationship between Pellegrino and the State.

Other courts have similarly held that a debtor's obligation to make restitution as a condition of probation is not a debt within the meaning of the Bankruptcy Code. *See In re Johnson, supra; In re Magnifico, supra; In re Button, supra.*[8] *But see In re Brown*, 11 B.C.D. 1048 (Bankr. M.D.

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[8] Decisions applying the Bankruptcy Act of 1898 also stand for this proposition. *See People v. Washburn*, 97 Cal. App. 3d 621, 158 Cal. Rptr. 822 (1979); *People v. Mosesson*, 78 Misc.2d. 217, 356 N.Y.S.2d 483 (Sup. Ct., N.Y. Co., 1974).

Tenn. 1984), *appeal docketed*, No.384-0585 (M.D. Tenn. May 22, 1984).

In *Button*, the debtor pleaded guilty to petty larceny, was placed on probation, and ordered to make restitution to the victim. As in this case, the debtor filed a Chapter 7 petition and listed his victim as a creditor. When the debtor stopped making restitution payments, he was charged with violation of probation which prompted him to seek a bankruptcy court order enjoining enforcement of the state court order of restitution.

The *Button* court held that restitution ordered as a condition of probation, pursuant to § 65.10(2) of the Penal Law of the State of New York,[9] was not a debt and the victim was not a creditor. *Button*, *supra*, 8 B.R. at 694. As the *Button* court explained,

> With restitution, the victim has no right to payment. It is the criminal court which sets the restitution amount and if it is not paid the victim cannot proceed against the debtor to enforce payment, but instead the probation officer must report the event of nonpayment to the court which in turn determines if a violation of probation has occurred.

Id.

The court in *In re Magnifico*, *supra*, 21 B.R. 800, likewise held that an obligation to pay restitution "is not a debt contemplated by the Bankruptcy Code." *Id.* at 803. The *Magnifico* court described restitution as "an obligation made directly to the State of Arizona, acting on behalf of its citizens for their benefit, and to further impress [upon] the debtor . . .

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[9] Section 65.10 of the New York Penal Law, like Conn. Gen Stat. § 53a-30, establishes conditions of probation which include restitution. The restitution provisions in these two statutes are virtually identical and form a part of a general statute intended in New York "to insure that the defendant will lead a law-abiding life or to assist him to do so," and in Connecticut to provide "conditions reasonably related to [the offender's] rehabilitation.

his criminal responsibility for his criminal acts." *Id.*

This court is aware that the bankruptcy court in *In re Brown, supra,* 11 B.C.D. 1048, recently held that restitution is a debt for purposes of the Bankruptcy Code. In so holding, the *Brown* court stated:

> If the right of payment and the liability in a criminal court order of restitution were intended to be outside of the realm of debt for bankruptcy purposes, then how simple it would have been for Congress to include appropriate language in the Bankruptcy Code.

Id. at 1049-1050.

This court acknowledges that the Bankruptcy Code's definition of "debt" contains no express exception for obligations arising out of state criminal proceedings. However, such an exception may be found in the long-standing tradition of restraint by federal courts from interference with traditional functions of state governments. *See Younger v. Harris,* 401 U.S. 37 (1971); *Perez v. Ledesma,* 401 U.S. 82 (1971); *In re Davis,* 691 F.2d 176 (3d Cir. 1982). Bankruptcy laws are no exception, particularly where criminal proceedings are involved. *See Barnette v. Evans,* 673 F.2d 1250 (11th Cir. 1982); *In re Wilson,* 30 B.R. 91 (Bankr. E.D. Tenn. 1983); *In re Richardello,* 28 B.R. 344, 10 B.C.D. 734 (Bankr. D. Mass. 1983). As the legislative history of Code § 362(b)(1) states,

> The bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension. Thus, criminal actions and proceedings may proceed in spite of bankruptcy.

House Report No. 595, 95th Cong., 1st Sess. 342, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6299. *See also* S. Rep. No. 989, 95th Cong., 2nd Sess. 51, *reprinted in* 1978 U.S. Code. Cong. & Ad. News 5787, 5837.

With this congressional policy in mind, it would defy both logic and reason to allow a convicted person, who has

been ordered to make restitution to his victim in lieu of incarceration, to use the Bankruptcy Code to escape the consequences of his crime. The definition of debt must therefore be read in the context of that policy in order to avoid that anomalous result.

The question then is does the fact that a state agency was the victim of a crime alter the conclusion that restitution is not a debt within the meaning of Code § 101(11)? While several courts have considered restitution in the context of a private victim, *In re Brown, supra; In re Johnson, supra; In re Magnifico, supra; In re Button, supra,* this appears to be the first court to consider the issue where a state is both the victim of the crime and the recipient of the restitution.

Although several parts of the Connecticut governmental unit were involved in the prosecution, collection, deposit and enforcement process necessitated by Pellegrino's criminal conduct, each must be considered as a separate entity in analyzing whether a debtor-creditor relationship was established by the state court order of restitution. Therefore the mere fact that one state agency was the actual victim of the crime and another part of the same governmental unit prosecuted Pellegrino and may enforce the order of restitution is an insufficient basis to create a debtor-creditor relationship between Pellegrino and the State. Had Pellegrino committed a crime against a private citizen, that victim, as previously observed, could not enforce the restitution order. Under those circumstances there would be no debtor-creditor relationship and no "debt" as defined in Code § 101(11) to be discharged. It is accordingly concluded that the mere fact that the State of Connecticut was the victim of Pellegrino's crime is irrelevant to the issues presented here. As Assistant State's Attorney Schuman correctly argued, "The people of the state [cannot] have fewer rights than a private victim."[10]

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[10]Tr. May 18, 1984, at 24.

In view of the foregoing, it is concluded that the state court's order that Pellegrino make restitution did not create a debt under the Bankruptcy Code. Accordingly, that obligation was unaffected by this court's August 26, 1983 discharge order.

Even assuming *arguendo* that the order of restitution is a "debt" within the purview of the Bankruptcy Code, the post petition collection of that debt by the defendants would not violate the automatic stay provided by Code § 362(a). Moreover, that "debt" would be excepted from discharge pursuant to Code § 523(a)(7).

B.
AUTOMATIC STAY

Although the Plaintiffs primarily seek a determination that the order of restitution is a dischargeable debt, their complaint also alleges that the defendants' post petition enforcement of the wage execution was a violation of the automatic stay provided by Code § 362(a).[11] The plaintiffs' contention is without merit. The wage execution on Louis

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[11] Although the plaintiffs do not designate which portions of Code § 362(a) they rely on, the subsections which appear to be consistent with their allegations are §§ 362(a)(1), 362(a)(2) and 362(a)(6) which provide in pertinent part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of –
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(continued

Pellegrino's wages was an integral part of the sentence which followed the state's prosecution of his wife.

Code § 362(b)(1) provides in relevant part:

> (b) The filing of a petition . . . does not operate as a stay –
>
> > (1) under subsection (a) this section, of the commencement or continuation of a criminal action or proceeding against the debtor.

The literal language of that provision together with its legislative history as an expression of congressional policy against bankruptcy court interference with criminal proceedings, recounted *supra* at p. 10, compels the conclusion that neither the restitution nor the wage execution, ordered as a means of carrying it out, were stayed by the filing of the plaintiffs' bankruptcy petition. *Accord, In re Newton*, 15 B.R. at 710 (Bankr. N.D. Ga. 1981) *aff'd*, No. C81-2170A (N.D. Ga. May 24, 1982). To view the wage execution and its enforcement throughout the five-year probationary period as separate from the conviction and sentencing of Pellegrino would distort reality.

The enforcement of the wage execution may also be viewed as the "continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power". As such, that activity is excepted from the automatic stay by § 362(b)(4). In addition, the en-

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[11]continued

> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (6)any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

forcement of the wage execution might arguably be excepted from the automatic stay under § 362(b)(5)[12] in that the wage execution was ordered to implement the state court judgment of conviction, a nonmonetary judgment, "obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulating power." The § 362(b)(4) and § 362(b)(5) exceptions to the automatic stay should be construed broadly "[w]here important state law or general equitable principles protect some public interest." *Penn. Terra Ltd. v. Dept. of Environ. Resources*, 733 F.2d 267 (3rd Cir. 1984).

It is therefore concluded that the enforcement of the wage execution ordered by the state court to implement its order of restitution was excepted from the automatic stay, and any post petition action by the defendants in that regard did not constitute contempt of this court's order.

C.

DISCHARGEABILITY

CODE § 523(a)(7)

As this court observed in a different context in *In re Harron*, 31 B.R. 466, 467-468 (Bankr. D. Conn. 1983)

> The rich tradition of justice and equity which has characterized our approach to the regulation

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[12]Code § 362(b)(5) provides in relevant part as follows:

> (b) The filing of a petition under section 301 . . . of this title, . . . does not operate as a stay –
>
> (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

> of society through law has long recognized that relief must be provided to the honest debtor who cannot endure the burden of financial distress. The current Bankruptcy Code and its predecessors provide that relief to individual debtors. Under the Code a two fold objective is sought. A debtor who files under Chapter 7 is relieved from his dischargeable debts and is given a fresh start in the form of allowable exemptions while the members of each class of his creditors are assured equal treatment in the distribution of his remaining assets. That balance, however, rests, *inter alia*, upon the premise that the petitioning debtor is honest and is therefore entitled to such relief, and when it can be demonstrated otherwise, the discharge is denied.

Code § 523(a) provides a statutory basis for challenging the dischargeability of certain debts, including debts for a fine or penalty. Thus, as noted, *supra*, even assuming *arguendo* that the state court order of restitution in this case is a debt within the purview of the Bankruptcy Code, the result in this proceeding would not change because such a debt would be excepted from discharge under Code § 523(a)(7). Code § 523(a)(7) provides in pertinent part:

> (a) a discharge under section 727, . . . of this title does not discharge an individual debtor from any debt –
>
> . . . .
>
> (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . .

The plaintiffs contend that the § 523(a)(7) exception to dischargeability does not apply here because the restitution order was established by the

state court to provide "compensation for actual pecuniary loss". There is no merit to that contention.

An analysis of Connecticut's probation statute, Conn. Gen. Stat. § 53a-30(a),[13] reveals an enumeration of eight specific kinds of conditional release and a ninth nonspecific method, consisting of "any other conditions reasonably related to [the offender's] rehabilitation." It is therefore apparent that the focus of Connecticut's probation statute is upon the offender and that the purpose of probation in Connecticut is rehabilitation.

The United States Supreme Court has defined probation as "an individualized program offering a[n] . . . unhardened offender an opportunity to rehabilitate himself without institutional confinement. . . ." *Roberts v. United States*, 320 U.S.

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[13]Conn. Gen. Stat. § 53a-30(a) provides in pertinent part:

> When imposing sentence of probation or conditional discharge, the court may, as a condition of the sentence, order that the defendant: (1) Work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment; (2) undergo medical or psychiatric treatment and remain in a specified institution, when required for that purpose; (3) support his dependents and meet other family obligations; (4) make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of performance; (5) if a minor, (A) reside with his parents or in a suitable foster home, (B) attend school, and (C) contribute to his own support in any home or foster home; (6) post a bond or other security for the performance of any or all conditions imposed; (7) refrain from violating any criminal law of the United States, this state or any other state; (8) reside in a residential community center or halfway house approved by the commissioner of correction, and contribute to the cost incident to such residence; (9) *satisfy any other conditions reasonably related to his rehabilitation.* (emphasis added).

264, 272, 64 S.Ct. 113, 117, 88 L.Ed. 41 (1943). The Connecticut courts have likewise long held:

> "[Probation's] aim is reformatory and not punitive. It is to bring one who has fallen into evil ways under oversight and influences which may lead him to a better living. The end sought is the good of the individual wrongdoer, and not his punishment.

Belden v. Hugo, 88 Conn. 500, 504, 91 A. 369, 370 (1914).

As one of the eight specific statutory options available to the state court imposing a sentence of probation, restitution is intended to promote the rehabilitation of the offender, not to compensate the victim. The rehabilitative nature of restitution, ordered as a condition of probation, was recognized by the Fifth Circuit Court of Appeals in *United States v. Carson*, 669 F.2d 216 (5th Cir. 1982). After receiving a discharge in bankruptcy, Carson was convicted under a federal law and ordered by the district court to make restitution to the defrauded bank. The defendant argued that because his debt to the bank had been discharged in bankruptcy, the district court abused its discretion by making restitution a condition of probation. The court rejected this argument and held that a federal court may order restitution as a condition of probation even though the debt which resulted in the conviction was discharged in bankruptcy. In so holding, the court stated:

> If the principal aim of the probation condition were to make the bank whole, this argument might have some appeal. In fact, though, while recompense to the victim is a usually laudable consequence of restitution, the focus of any probation regimen is on the offender. The order of probation is "an authorized mode of mild and ambulatory punishment . . . intended as a reforming discipline." *Korematsu v. United States*, 319 U.S. 432, 435, 63 S.Ct. 1124, 1126, 87 L.Ed. 1497 (1943), *quoting Cooper v.*

United States, 91 F.2d 195, 199 (5th Cir. 1937).

Id. at 217.

In support of their claim that restitution was ordered to provide "compensation for actual pecuniary loss," the plaintiffs relied upon the fact that the restitution ordered was the precise amount of the victim's loss.[14] The plaintiff's reliance is misplaced. The amount of restitution has no bearing on its purpose.

The state court is given discretion under Conn. Gen. Stat. § 53a-30 (a)(4) to order an offender to "make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay, or provide in a suitable manner, for the loss or damage caused thereby". The state court could therefore have set the amount of restitution at the amount of the victim's loss or less, depending upon the offender's ability to pay. Moreover, Conn. Gen. Stat. § 53a-30(c) authorizes the court to modify or enlarge the conditions of probation for good cause shown during the period of probation. That statutory scheme reinforces the conclusion that the focus of restitution, as with the other methods of conditional release, is upon the offender and not on the victim, and that restitution is part of the criminal penalty rather than compensation for a victim's actual loss.

In *In re Cox*, 33 B.R. 657, 11 B.C.D. (Bankr. M.D. Ga. 1983) the court considered the dischargeability, under Code § 523(a)(7), of a debtor's obligation to pay the costs of prosecution ordered by the United States District Court. In finding that the costs were nondischargeable under § 523(a)(7), the bankruptcy court stated that "the obligation to pay the costs

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[14] Although the state court ordered restitution in the amount of the victim's $15,960.00 loss, the manner of payment established by the court ($1,000 initially and $40 per week for five years) would result in the payment of less than that amount.

of prosecution was imposed as a penalty to punish Defendant for his violation of the criminal laws, rather than to compensate Plaintiff for actual pecuniary loss." *Id.* at 662, 11 B.C.D. at 91.

This proceeding, like *Cox*, is distinguishable from cases where a creditor or a prosecuting attorney initiates a criminal action to collect an underlying debt. *See, e.g., In re Alan I. W. Frank Corp.*, 19 B.R. 41 (Bankr. E. D. Pa. 1982); *In re Strassmann*, 18 B.R. 346 (Bankr. E.D. Pa. 1982); *In re Whitker*, 16 B.R. 917 (Bankr. M.D. Tenn. 1982); *In re Taylor*, 16 B.R. 323 (Bankr. D. Md. 1981). No persuasive evidence was offered to demonstrate that the state prosecuted Pellegrino for any reason other than to obtain a conviction for the violation of the state's penal code. As the court stated in *In re Holder*, 26 B.R. 789, 791 (Bankr. M.D. Tenn. 1982):

> [A] federal court's power to interfere with state criminal proceedings is narrowly circumscribed and such interference is only justified when the evidence clearly and convincingly reflects that the criminal proceeding is primarily intended to collect a civil debt in contravention of either the automatic stay or discharge provisions of the Bankruptcy Code.

The facts here are also distinguishable from instances where a state agency attempts to enforce a statute directed at a debtor's financial obligations rather than the state's health and public safety concerns such as, for example, where a state agency attempts to enforce its motor vehicle financial responsibility law against a Chapter 7 debtor. *See In re Sampson*, 17 B.R. 528, 8 B.C.D. 992 (Bankr. D. Conn. 1982).

As earlier observed, federal courts should use restraint when their decisions might interfere with traditional state functions. There is no more appropriate application of that policy than in the area of criminal law where states have a primary responsibility to promote the safety and welfare of

their citizens through the enforcement of their criminal statutes. This policy, which extends to noninterference with state criminal proceedings, is endorsed by the Bankruptcy Reform Act of 1978 and its legislative history and, in this proceeding supports the conclusion that the restitution order, as part of a criminal action against Pellegrino, is excepted from discharge under Code § 523(a)(7). It would be incongruous that the drafters of the Bankruptcy Code, mindful of the wisdom of noninterference with criminal prosecutions, would limit, under Code § 362(b)(1), the scope of the automatic stay to allow the continuation of criminal proceedings against a debtor and then provide for the discharge of restitution, one of the sanctions made available to the criminal court by the state legislature.

Having considered the pleadings, the relevant evidence, the arguments of counsel and congressional intent, this court of equity will not read the Bankruptcy Code as permitting Pellegrino to escape the consequences of her crime. Justice is the end result when the rule of law is interpreted with common sense, reason and simple fairness. Here a convicted felon and her husband, who wished to save her from incarceration, pleaded for lieniency in the state court. She was spared the penalty of incarceration on the condition that restitution would be made. The plaintiffs now come to this court to repudiate that obligation, claiming that the Bankruptcy Code provides that relief. It does not. It is a distortion of bankruptcy law and policy to view Code § 523(a)(7) as a shield to restitution obligations in the context of this proceeding. As the court in *In re C. H. Stuart, Inc.*, 12 B.R. 85, 86 (Bankr. W.D.N.Y. 1981) noted, "A thief cannot escape criminal sanctions by filing bankruptcy and listing his victim on his schedule of unsecured creditors." The bankruptcy laws were not enacted and must not be interpreted to provide a refuge to criminals. The plaintiffs bargained in state court for Pellegrino's freedom. This court will not permit them to escape the full obligations of that bargain.

III.

ORDER

For the foregoing reasons, the obligations created by the October 29, 1982 state court restitution order are not discharged, therefore the plaintiffs are not entitled to the injunctive relief, damages, costs, attorney's fees and the other relief claimed in their amended complaint and judgment may enter accordingly.

Dated at Bridgeport, this 25th day of July, 1984.

(Sig.)

Alan H. W. Shiff
United States Bankruptcy Judge

It is SO ORDERED.

Dated at Bridgeport, this 26th Day of July, 1984.

(sig.)
T. F. Gilroy Daly
Chief Judge, United States District Court

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re
CAROLYN ROBINSON,

Debtor

Chapter 7
Case No. 5-81-00114

CAROLYN ROBINSON,

Plaintiff

v.

DIRECTOR, OFFICE OF ADULT PROBATION;
AUSTIN J. MCGUIGAN, CHIEF STATE'S ATTORNEY, DIVISION OF CRIMINAL JUSTICE OF THE JUDICIAL DEPARTMENT;
COMMISSIONER, DEPARTMENT OF INCOME MAINTENANCE;
COMMISSIONER DEPARTMENT OF ADMINISTRATIVE SERVICES,

Defendants

Adv. No. 5-84-0063

JUDGMENT

This action having come on for hearing before the United States Bankruptcy Court for the District of Connecticut at Bridgeport, and the issues having been duly heard and a decision having been duly rendered, it is

ORDERED AND ADJUDGED that the obligations created by the November 14, 1980 state court restitution order were not discharged and that the plaintiff is not entitled to injunctive relief, damages, costs, attorney's fees and other relief claimed in her complaint.

Dated at Bridgeport, this 4th day of September, 1984.

(Sig.)

T. F. Gilroy Daly
Chief Judge, United States District Court

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1002—August Term, 1984

(Argued April 11, 1985 Decided October 29, 1985)

Docket No. 84-5077

IN RE: CAROLYN ROBINSON,

Debtor.

CAROLYN ROBINSON,

Plaintiff-Appellant,

—v.—

AUSTIN J. MCGUIGAN, CHIEF STATE'S ATTORNEY, DIVISION OF CRIMINAL JUSTICE, JUDICIAL DEPARTMENT; DIRECTOR, OFFICE OF ADULT PROBATION; COMMISSIONER, DEPARTMENT OF INCOME MAINTENANCE; and COMMISSIONER, DEPARTMENT OF ADMINISTRATIVE SERVICES, BUREAU OF COLLECTION SERVICES,

Defendants-Appellees.

6545

Before:

MANSFIELD, KEARSE, and PRATT,
Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut, T.F. Gilroy Daly, *Chief Judge*, declaring plaintiff's obligation to make criminal restitution payments, imposed on her as a condition of the probation to which she was sentenced upon her conviction for larceny, not discharged by the discharge granted her in a subsequent Chapter 7 bankruptcy proceeding. *See* 45 B.R. 423 (Bankr. D. Conn. 1984).

Reversed and remanded.

Judge Mansfield concurs in a separate opinion.

FRANCIS X. DINEEN, New Haven, Connecticut (Joanne S. Faulkner, New Haven, Connecticut, on the brief), *for Plaintiff-Appellant*.

CARL SCHUMAN, Assistant State's Attorney, Wallingford, Connecticut (Austin J. McGuigan, Chief State's Attorney, Wallingford, Connecticut, Edward F. Reynolds, Jr., Assistant Attorney General, Hartford, Connecticut, on the brief), *for Defendants-Appellants*.

KEARSE, *Circuit Judge*:

Plaintiff Carolyn Robinson, convicted of larceny in state court and ordered, as a condition of the probation to which she was sentenced, to repay the amount wrongfully received to the Connecticut Office of Adult Probation ("COAP"), appeals from a judgment of the United States District Court for the District of Connecticut, T.F. Gilroy Daly, *Chief Judge*, declaring that her obligation to make the criminal restitution payments to COAP was not discharged by the order of discharge granted Robinson in her subsequent bankruptcy proceeding under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 701-766 (1982). The court ruled that criminal restitution obligations are not "debts" within the meaning of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (1982), and that, even if such obligations are debts, they are "penalties" excepted from discharge by § 523(a)(7) of the Code, 11 U.S.C. § 523(a)(7). For the reasons below, we disagree with the court's interpretations of the Code, and we reverse and remand.

I. BACKGROUND

The material facts are not in dispute. In 1980, Robinson was convicted of larceny in the second degree for wrongfully receiving $9,932.95 in Public Assistance benefits from the Connecticut Department of Income Maintenance ("CDIM") while simultaneously receiving Social Security benefits. On November 14, 1980, she was sentenced by the Connecticut Superior Court to, *inter alia*, a five-year term of probation; as one of the conditions of that probation, the Connecticut court ordered Robinson to make restitution of the Public Assistance benefits wrongfully received by paying $9,932.95 to the predeces-

sor of COAP (also referred to hereinafter as "COAP"), in monthly installments of $100 beginning January 16, 1981. Robinson complied through May 4, 1981, making payments totaling $450.

On February 5, 1981, Robinson filed a voluntary petition under Chapter 7 in the United States Bankruptcy Court for the District of Connecticut. Part of that petition was a schedule of creditors which listed, *inter alios*, CDIM as having a claim of $6,000 for "public assistance" and COAP as having a claim of $9,932.95 for "restitution." On February 20, 1981, the bankruptcy court notified both COAP and CDIM of Robinson's Chapter 7 petition, and informed them that April 27, 1981, was the last day for the filing of objections to discharge and "complaints to determine the dischargeability of any debt pursuant to 11 U.S.C. section 523(c)." Neither COAP nor CDIM filed a proof of claim, or an objection to discharge, or a complaint to determine the dischargeability of its claim. On May 14, 1981, the bankruptcy court issued an order (the "Discharge Order") discharging Robinson "from all dischargeable debts," declaring "null and void" all existing or future judgments that purported to hold Robinson personally liable with respect to any such dischargeable debts, and enjoining all creditors whose debts were thereby discharged from thereafter endeavoring to collect such debts.

On May 20, 1981, Robinson's attorney wrote COAP, stating that the Discharge Order discharged Robinson's obligation to make restitution payments to COAP and that Robinson had been advised by the attorney that she need make no further restitution payments. The letter urged COAP, if it disagreed with the view that Robinson's obligation had been discharged, to contact the attorney

immediately. COAP apparently did not respond, and Robinson ceased making restitution payments.

Nearly three years later, in February 1984, COAP informed Robinson that its policy was "that the condition of probation concerning restitution is valid and not dischargeable," that it "intend[ed] to enforce the [restitution] order to the fullest extent possible," and that it was requesting that Robinson resume payment. Robinson responded by filing the present adversary proceeding in bankruptcy court against COAP, CDIM, and other state officials, seeking a judgment, *inter alia*, declaring that the Discharge Order had discharged her restitution obligations to COAP and CDIM, enjoining defendants from taking any steps to obtain further restitution payments, and awarding her compensatory and punitive damages and attorney's fees. Robinson moved for preliminary injunctive relief against defendants' taking steps to enforce payment, revoke probation, or report a violation of probation.

Following a brief trial on the merits, the bankruptcy court, Alan H.W. Shiff, *Judge*, entered a brief Memorandum and Proposed Order, reported at 45 B.R. 423 (Bankr. D. Conn. 1984), denying all of the relief sought by Robinson. The court concluded that

> [t]he State court's order that the plaintiff make restitution to the State of Connecticut of $9,932.95 as a condition of probation following the plaintiff's larceny conviction did not create a "debt" as defined in Code § 101(11). Therefore the plaintiff's obligation to pay restitution was unaffected by this court's May 14, 1981 discharge order.
>
> Assuming *arguendo* that the state court's order of restitution did create a "debt" within the purview of

the Bankruptcy Code, such a debt is a "penalty" and therefore excepted from discharge under § 523(a)(7).

Id. at 424-25 (footnotes omitted). The court based its ruling on its prior, more fully explicated, decision in *In re Pellegrino*, 42 B.R. 129 (Bankr. D. Conn. 1984), which the court viewed as virtually identical to the present case. The bankruptcy court's proposed order was adopted by the district court, and judgment was entered in favor of the defendants, declaring that Robinson's restitution obligation had not been discharged by the Discharge Order and denying her any other relief.

On this appeal, Robinson contends that her restitution obligation was a debt within the meaning of § 101(11) of the Code, 11 U.S.C. § 101(11), that it was not excepted from discharge by any of the exceptions set forth in 11 U.S.C. § 523, and that it was, therefore, under 11 U.S.C. § 727, discharged by the Discharge Order. We agree with this interpretation of the Code, and we therefore reverse the district court's judgment and remand for entry of declaratory and injunctive relief in favor of Robinson, and for further proceedings on her claims for other relief.

II. DISCUSSION

Chapter 7 of the Bankruptcy Code allows an individual debtor who meets certain criteria, not in issue here, to obtain a discharge in bankruptcy which, "[e]xcept as provided in section 523 of [the Code], . . . discharges the debtor from all debts that arose before the date of the order for relief under this chapter [here, the date of the filing of the voluntary petition, *see* 11 U.S.C. § 301 (1982)] . . . ." 11 U.S.C. § 727(b). The effect of a discharge is to

> (1) void[ ] any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727 . . . ; [and to]
>
> (2) operate[ ] as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor . . . .

11 U.S.C. § 524(a).

The applicability of §§ 727(b) and 524(a) to Robinson depends, first, on whether her obligation to make restitution to COAP is properly construed as a "debt" within the meaning of those sections, and, second, if it is such a "debt," on whether any provision of § 523 makes that debt nondischargeable.

A. *The Restitution Obligation as a Debt*

"Debt" is defined in the Code as "liability on a claim." 11 U.S.C. § 101(11). A "claim" is defined as a

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured . . . .

11 U.S.C. § 101(4). Focusing on the "right to payment" part of the definition, we see that a debt, within the

meaning of the Code, is a liability as to which someone has a right of payment.

In ruling that Robinson's criminal restitution obligation was not a debt, the bankruptcy court adopted the opinion in *In re Pellegrino*, 42 B.R. 129, in which the court had concluded that a similar obligation was not a debt for two reasons. First, the *Pellegrino* court concluded, as a matter of statutory interpretation, that the obligation to make criminal restitution was not within the Code's definition of debt because the victim of the crime had no right to payment: "Under the [Connecticut] penal code, a victim cannot enforce a court's order of restitution if the criminal defendant fails to make payments to [COAP]." *Id.* at 132. Second, the *Pellegrino* court ruled as a matter of policy that criminal restitution obligations should not be construed as falling within the Code's definition of debts because " '[t]he bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension.' " *Id.* at 134 (quoting H.R. Rep. No. 595, 95th Cong., 2d Sess. ("House Report") 342, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6299). The court reasoned that

> it would defy both logic and reason to allow a convicted person, who has been ordered to make restitution to his victim in lieu of incarceration, to use the Bankruptcy Code to escape the consequences of his crime. The definition of debt must therefore be read in the context of that policy in order to avoid that anomalous result.

In re Pellegrino, 42 B.R. at 134. A majority of the courts that have considered this issue have adopted the same line of reasoning and held a criminal restitution obligation not a debt under the Code. *See, e.g., In re Button*, 8 B.R. 692

(Bankr. W.D.N.Y. 1981); *In re Oslager*, 46 B.R. 58 (Bankr. M.D. Pa. 1985); *In re Vik*, 45 B.R. 64 (Bankr. N.D. Iowa 1984); *In re Cornell*, 44 B.R. 528 (Bankr. D. Conn. 1984); *In re Mead*, 41 B.R. 838 (Bankr. D. Conn. 1984); *In re Cox*, 33 B.R. 657 (Bankr. M.D. Ga. 1983); *In re Johnson*, 32 B.R. 614 (Bankr. D. Colo. 1983); *In re Magnifico*, 21 B.R. 800 (Bankr. D. Ariz. 1982).

We disagree with the reasoning and the conclusions of the *Pellegrino* line of cases. First, the literal terms of § 101(4)(A) are sufficiently broad—apparently by congressional design—to define as a debt a restitution obligation as to which *any* person or entity, not just the crime victim, has a right to payment. Since, as we discuss below, COAP has a right to enforce the judgment of restitution, Robinson's restitution obligation falls within the Code's definition of debt. Second, the congressional statement quoted by the *Pellegrino* line of cases to the effect that the bankruptcy laws were not intended to be a haven for criminals is taken out of context, and the injection of that thought into the definition of "debt" ignores other facets of the statutory scheme that give evidence that Congress did not intend to exclude financial obligations arising out of crimes from its definition of debt.

1. *The Breadth of the Definition of "Claim"*

The legislative history of the Code reveals that in enacting § 101(4), Congress sought the "broadest possible definition" of a claim, House Report at 309, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6266, intending that virtually all obligations to pay money be amenable to treatment in bankruptcy proceedings. The present language of § 101(4)(A) first appeared in H.R. 8200, 95th Cong., 1st Sess. § 101(4)(A), 123 Cong. Rec. 35,644,

35,644 (1977). In the report accompanying that bill, the House of Representatives Committee on the Judiciary explained the intent of its new definition of claim as follows:

> H.R. 8200 abolishes the concept of provability in bankruptcy cases. All claims against the debtor, whether or not contingent or unliquidated, will be dealt with in the bankruptcy case. . . . The proposed law will permit a complete settlement of the affairs of a bankrupt debtor, and a complete discharge and fresh start.
>
> . . . .
>
> . . . [Section 101(4)] adopts an even broader definition of claim than is found in the present debtor rehabilitation chapters. . . . By this *broadest possible definition*, and by the use of the term throughout the title 11, . . . the bill contemplates that *all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case*. It permits the broadest possible relief in the bankruptcy court.

House Report at 180, 309 (emphasis added; footnotes omitted), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6141, 6266. The Senate Report that accompanied S. 2266, *reprinted in Bankruptcy Reform Act of 1978: Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 3 (1977), a bill with language identical to that of § 101(4)(A), contained an explanation of the new definition of claim identical to that contained in the House Report. *See* S. Rep. No. 989, 95th Cong., 2d Sess. ("Senate Report")

21-22, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5807-08.

Consistent with the congressional intent evinced by the legislative history, courts construing § 101(4) in a variety of contexts not involving restitutionary debts have acknowledged the breadth of the definition of claim, characterizing it as, *inter alia*, "broad," *Ohio v. Kovacs*, 105 S. Ct. 705, 709 (1985); "very broad," *In re M. Frenville Co., Inc.*, 744 F.2d 332, 336 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 911 (1985); "extremely broad[ ]," *In re Kennise Diversified Corp.*, 34 B.R. 237, 244 n.6 (Bankr. S.D.N.Y. 1983); "could not be broader," *In re Thomas*, 12 B.R. 432, 433 (Bankr. S.D. Iowa 1981); "broadest possible," *Kallen v. Litas*, 47 B.R. 977, 982 (N.D. Ill. 1985); *In re Vasu Fabrics, Inc.*, 39 B.R. 513, 517 (Bankr. S.D.N.Y. 1984); *In re Johns-Manville Corp.*, 36 B.R. 743, 754 n.6 (Bankr. S.D.N.Y. 1984); "all-encompassing," *In re Baldwin-United Corp.*, 48 B.R. 901, 903 (Bankr. S.D. Ohio 1985); *In re Barnett*, 42 B.R. 254, 257 (Bankr S.D.N.Y. 1984); and "sufficiently broad to cover any possible obligation," *In re Smith Jones, Inc.*, 26 B.R. 289, 293 (Bankr. D. Minn. 1982).

Nonetheless, as indicated above, the majority of courts that have considered whether an obligation to make criminal restitution is a debt within the meaning of the Code have concluded that it is not. The lone exception, so far as we are aware, is *In re Brown*, 39 B.R. 820 (Bankr. M.D. Tenn. 1984). In *Brown*, the debtor had been placed on probation following his plea of guilty to "driving under the influence" and ordered to pay restitution to a person whose property had been damaged by the debtor's faulty driving. The *Brown* court noted that although the restitution order required the debtor to pay the victim

directly, the victim himself had no right to enforce the restitution obligation and could only urge the district attorney to place pressure on the debtor by threatening the revocation of probation. The court reasoned, however, that since the record established that the restitution order was designed solely to compensate the victim for his damages, and since any civil judgment recovered by the victim to compensate him for those damages would result in a debt that was dischargeable in bankruptcy, the restitution obligation must likewise be construed as a debt within the meaning of the Code. *Id.* at 822-23. The *Brown* court rejected the reasoning of the courts that had ruled that criminal restitution obligations were not debts under the Code, concluding that " '[d]ebt' . . . is not restricted to obligations incurred in consumer or business transactions, but includes *all* obligations [to pay], however[ ] incurred." *Id.* at 822 (emphasis in original).

We agree with the general principle enunciated in *Brown*—although our analysis proceeds along somewhat different lines—and disagree with the majority view that an obligation to make criminal restitution payments is not a debt under the Code unless it is enforceable by the victim of the crime. As we read the language of § 101(4)(A) and the legislative history of its adoption, Congress intended "claim" to encompass any right held by any person or entity to enforce any money obligation of the debtor. Thus, as discussed above, Congress intended the term "claim" to have the broadest possible scope. There appears to be no basis, for example, for any supposition that Congress intended an interpretation of "claim" that would exclude rights to restitution in general from the definition of "claim." Since only "claims" are allowable in bankruptcy, *see* 11 U.S.C. § 502, and only

holders of allowed claims are entitled to distributions from the bankruptcy estate, *see* 11 U.S.C. § 726, such an interpretation would produce the anomalous result that no holder of a right to restitution could participate in the bankruptcy proceeding or receive any distributions of the debtor's assets in liquidation. There is no evidence that Congress intended such a result. Indeed, a judgment ordering restitution of a stated sum was a provable claim under § 57 of the Bankruptcy Act of 1898 ("1898 Act"), 11 U.S.C. § 93 (1976) (repealed); *see id.* § 63, 11 U.S.C. § 103(a) (1976) (repealed) (defining provable debts), and the holder of such a claim would have been entitled under the 1898 Act to participate in the distribution of the debtor's assets. Since Congress intended its definition of "claim" in the Code to expand the class of obligations that would be dischargeable, it is hardly conceivable that it thought that a right to restitution provable under the 1898 Act would now be construed as outside of the Code's broad definition of claim.

Nor do we see any indication that Congress intended some rights to restitution but not others to be within the definition of claim. There is no suggestion in the language of § 101(4) that the definition of claim is limited in terms of the identity of the person or entity who has the right to be paid. Nor do we see any such suggestion in the legislative history. We likewise see no indication in the language or the legislative history that the definition is limited in terms of the provenance of the right to restitution. Rather, it would appear, for example, that whether the right arose from a cause of action for fraud or mistake, or was granted as a condition for the remedy of rescission, or was ordered in the context of criminal probation, if it is a right to payment it is a claim within the meaning of the Code.

Finally, we note that, by giving "claim" the broadest possible definition and defining "debt" in terms of a "claim," Congress also sought to give the term "debt" its broadest possible scope. Thus, the congressional reports accompanying the proposed section that became § 101(11) of the Code, stated that the concepts of debt and claim were "coextensive: a creditor has a 'claim' against a debtor; the debtor owes a 'debt' to the creditor." Senate Report at 23, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5809; House Report at 310, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6267. And we have held that the terms claim and debt are "coterminous." *In re Villarie*, 648 F.2d 810, 812 (2d Cir. 1981); *see also In re Vasu Fabrics, Inc.*, 39 B.R. at 516-17.

In sum, we see no support in the language, the legislative history, or the statutory scheme as a whole for the view adopted by the *Pellegrino* line of cases that unless the victim of the crime has a right of payment, a criminal restitution obligation is not a debt within the meaning of the Code. We think the interpretation that more faithfully reflects Congress's intent is the one we adopt here: that any right to the payment of restitution is a claim within the meaning of the Code; and that if any person or entity has a right to receive a payment of restitution from the bankruptcy debtor, the obligor has a debt within the meaning of the Code.

The court of appeals cases cited to us by defendants in support of their position that a criminal restitution obligation is not a debt within the meaning of the Bankruptcy Code are inapposite. In *United States v. Brown*, 744 F.2d 905 (2d Cir.), *cert. denied*, 105 S. Ct. 599 (1984), a sentence of restitution imposed under 18 U.S.C. §§ 3579 and 3580 (1982) was challenged on the ground that its

imposition by the sentencing court sitting without a jury violated the Seventh Amendment's guarantee of the right to jury trial "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars," U.S. Const. amend. VII. The court's holding that the sentencing hearing was not a "Suit[ ] at common law" for Seventh Amendment purposes provides no insight into whether the restitution order that emerges from such a hearing constitutes a debt within the meaning of the Bankruptcy Code. Nor do *In re Davis*, 691 F.2d 176 (3d Cir. 1982), or *Barnette v. Evans*, 673 F.2d 1250 (11th Cir. 1982), support the proposition that criminal restitution obligations are not debts. Each involved a debtor in a pending bankruptcy proceeding who had not yet had a restitution obligation imposed on him in a pending criminal case. In each, the appellate court simply ruled that the bankruptcy court could not enjoin the state criminal prosecution that might result in a restitution order. In a similar vein, *United States v. Carson*, 669 F.2d 216 (5th Cir. 1982), and *United States v. Alexander*, 743 F.2d 472 (7th Cir. 1984), held that the discharge of a debt in bankruptcy did not prevent the district court from imposing a restitution obligation upon the debtor's subsequent conviction of a crime involving that debt. The latter four decisions merely reflect (1) the courts' analytical distinction between the obligation that arose upon the occurrence of the event and the obligation that would arise upon entry of a criminal restitution order, and (2) the requirement of § 727(b) of the Code that the obligation sought to be discharged as a debt—there the criminal restitution obligation—must have been in existence at the time of the bankruptcy proceeding. These cases do not purport to hold that a restitutionary obligation that was in existence

at the time of the bankruptcy proceeding is not a debt because it is in the nature of criminal restitution.

2. *"A Haven for Criminal Offenders"*

Nor are we persuaded by the reasoning in the *Pellegrino* line of cases that because Congress stated that it did not intend the bankruptcy laws to provide a haven for criminals the Code's definition of "debt" must be read as excluding an obligation to make restitution of unlawfully gained funds. The quotation from the legislative history upon which those cases rely as evidence of Congress' concern in this area is drawn not from Congress' discussion of the definitions of debt and claim, but from a discussion of the automatic stay of pending actions provided for in 11 U.S.C. § 362. The quoted statement is given as an explanation of the exception to that stay, created by § 362(b)(1), for "criminal action[s] or proceeding[s] against the debtor." *See* House Report at 342, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6299; Senate Report at 51, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5837; 2 *Collier on Bankruptcy* ¶ 362.05[1], at 362-38 to 362-39 (L. King 15th ed. 1983). Nowhere in the lawmakers' discussion of the definitions of "debt" and "claim" is there any mention of an intention to restrict those definitions to exclude obligations arising out of criminal activities.

Indeed, the scheme devised by Congress to prevent the bankruptcy laws from providing a haven for criminals reveals that Congress did not intend so to restrict its deliberately broadened definitions of those terms. Thus, one of the methods chosen to deny criminals a bankruptcy ploy was the provision in § 523 of the Code that a "debt . . . for a fine, penalty, or forfeiture payable to

and for the benefit of a governmental unit" (to the extent it is not compensation for actual loss, *see* Part II.B. below) is not dischargeable. 11 U.S.C. § 523(a)(7). But the very provision for such an exclusion makes clear that Congress did not intend to restrict its *definitions* of claim and debt, for, under § 727(b), only "debt[s]" are dischargeable, and § 523 deals only with "debt[s]". If the obligation to pay a criminal fine, penalty, or forfeiture were not within the Code's definition of "debt," presumably § 523 would not refer to it as a debt, and indeed there would be no need for § 523 to state that it is not dischargeable. Since it is thus clear that Congress did not believe that the inclusion of fines, penalties, and forfeitures within the Code's definition of debt would provide an unwarranted haven for criminals, there is no reason to suppose that it sub silentio believed that including a criminal restitution obligation within that definition would give such haven.

Finally, it is plain that Congress was attentive to the possibility that the bankruptcy laws might be invoked by criminals in an effort to retain their unlawful gains, and it enacted both provisions that thwart those efforts and provisions that, despite those efforts, give precedence to the bankruptcy laws' aim to provide relief for financial overextension. Thus, as noted, § 362(b)(1) makes the automatic stay of pending proceedings inapplicable to criminal proceedings against the debtor; § 523(a)(7) makes certain obligations to pay moneys to governmental bodies nondischargeable. On the other hand, as discussed in Part II.B. below, § 523(c) of the Code provides that debts for crimes such as larceny and fraud "shall be discharged" unless the creditor to whom such a debt is owed files an objection with the court and the court

thereafter determines that the debt is excepted from discharge. "If the creditor does not act, the debt is discharged." House Report at 365, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6321.

Thus, Congress drew such lines as it thought appropriate to grant or deny criminals the benefits of the bankrutpcy laws. Where Congress has carefully considered a particular policy and, in a complex and carefully drawn statute, has established a balance between that policy and other competing legislative goals, it is inappropriate for a court, based on its own view as to the relative importance of that policy, to create judicial exceptions to the clear language of the statute that are warranted neither by that language nor by the legislative history. *See Central Trust Co. v. Official Creditors' Committee of Geiger Enterprises, Inc.*, 454 U.S. 354, 357-60 (1982) (per curiam); *Caminetti v. United States*, 242 U.S. 470, 485 (1917). In our view, the courts in *Pellegrino, et al.*, in holding that policy reasons should prevent a criminal restitution obligation from being construed as a debt within the meaning of the Bankruptcy Code, have impermissibly reordered the priorities established by Congress. We decline to join them.

3. *COAP's Right to Payment*

Having concluded that if any entity has a right to payment of a criminal restitution obligation that obligation is a debt within the meaning of the Code, the only remaining question in our analysis of whether or not Robinson's obligation was such a debt is the question of whether COAP has such a right. We conclude that it does.

The Connecticut sentencing court, acting pursuant to Conn. Gen. Stat. Ann. § 53a-30(a)(4) (West Supp. 1981)

(amended in a manner not material to this case by Public Act 82-298, § 8, 1982 Conn. Legis. Serv. 1076, 1080 (West)), ordered Robinson to make restitution of the wrongfully received Public Assistance benefits, and to make the restitutionary payments to COAP. In accordance with the statutory scheme, the amount of the restitution obligation was fixed by the sentencing court, *see* Conn. Gen. Stat. Ann. § 53a-30(a)(4) (West Supp. 1985), and the enforcement of the obligation became the responsibility of both the sentencing court and the state probation officers, *id.* § 53a-32(a) (West 1972); *id.* § 54-108 (West Supp. 1985). Those officers, who are agents of COAP, are authorized to cause any probationer who violates any condition of his probation to be arrested, detained, and brought before the court on charges of probation violation. *Id.* § 53a-32(a) (West 1972). If a violation is established, the court may revoke the sentence of probation and order the probationer incarcerated. *Id.* § 53a-32(b).

Plainly, then, COAP has the right to receive payment from Robinson and the power to seek enforcement of its right. The fact that the amount of money it has the right to receive has been fixed by the court is irrelevant to the existence of the right. Nor is it relevant that the right is enforceable by the threat of revocation of probation and incarceration rather than by the threat of levy and execution on the debtor's property. The right is not the less cognizable because the obligor must suffer loss of freedom rather than loss of property upon failure to pay.

In sum, we conclude that since the judgment creating Robinson's obligation to make restitution to COAP created a concomitant right in COAP to payment of that obligation, Robinson's obligation to make those restitu-

tion payments was a debt within the meaning of the Bankruptcy Code.

B. *The Dischargeability of the Restitution Debt*

The final question is whether Robinson's restitution debt to COAP was dischargeable. Section 523 of the Code, 11 U.S.C. § 523, excludes from discharge several categories of debts that would otherwise be discharged under § 727(b), and three of these categories have arguable relevance to the present case. Section 523(a) provides, in pertinent part, as follows:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
>
> . . . .
>
> (2) for obtaining money, property, services, or an extension, renewal, or refinance of credit, by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; or
>
> (B) use of a statement in writing—
>
> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;
>
> (iii) on which the creditor to whom the debtor is liable for obtaining such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with the intent to deceive;

. . . .

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

. . . .

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . . .

11 U.S.C. § 523.

While at first glance all three subsections seem to have at least potential applicability to Robinson's debt, only subsection (a)(7) need concern us on this appeal. Although Robinson's obtaining Public Assistance benefits to which she was not entitled may well have occurred as a result of false representations within the meaning of subsection (a)(2), and although she was convicted of larceny, which is covered by subsection (a)(4), the Code does not exclude debts within these subsections from discharge if the creditor does not object to discharge. Thus, § 523(c) of the Code provides that

the debtor shall be discharged from a debt specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owned [*sic*], and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

11 U.S.C. § 523(c). *See* Bankruptcy Rule 409(a) (*reprinted in* 11 U.S.C. app. 217 (1982)); Senate Report at 80, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5865-66; House Report at 365, *reprinted in* 1978 U.S. Code Cong. & Ad. News, 5963, 6321; 3 *Collier on Bankruptcy* ¶ 523.21 (L. King 15th ed. 1983).

In the present case, the bankruptcy court gave COAP and CDIM notice in February 1981 that their claims were listed in Robinson's petition; that April 27, 1981, was the last day for filing objections to discharge or complaints to determine dischargeability under § 523(c); and that the failure by that date to file a complaint as to the dischargeability of a debt under §§ 523(a)(2) or (4) might result in discharge of the debt. COAP and CDIM did not file such objections or complaints. We suspect that had objection been made on the ground that the debt was for an established larceny, the court would have excepted it from discharge, and the case would not be before us now. COAP and CDIM waived their rights under subsections (a)(2) and (a)(4), however, and we turn, therefore, to their contention that the debt was nondischargeable under subsection (a)(7).

Subsection (a)(7) makes a debt nondischargeable "to the extent" that (1) it is for a "fine, penalty, or forfeiture," (2) it is "payable to and for the benefit of a governmental unit," and (3) it is "not compensation for actual pecuniary loss." 11 U.S.C. § 523(a)(7). There is no question that Robinson's restitution debt is in a sense a penalty for her crime. *See, e.g., United States v. Brown*, 744 F.2d at 909; *United States v. Carson*, 669 F.2d at 217-18; *In re Vik*, 45 B.R. at 67-68; *In re Johnson*, 32 B.R. at 616; *In re Magnifico*, 21 B.R. at 803; *see also* 18 U.S.C. § 3579(a)(1), which empowers a federal court

sentencing a defendant for an offense under title 18 to order the defendant to make restitution "in addition to or in lieu of any *other* penalty" (emphasis added). Nor is there any question that Robinson's debt is payable to and for the benefit of a governmental unit. We do not believe it can be said, however, that the debt is "not," "to [some] extent," "compensation for actual pecuniary loss."

Under the Connecticut probation scheme, the state court is given discretion to order an offender to "make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, *for the loss or damage caused thereby*". Conn. Gen. Stat. Ann. § 53a-30(a)(4) (West Supp. 1985) (emphasis added). Thus, the amount of restitution to be assessed against a defendant, though it may be adjusted to account for his ability to pay, is measured by the fruits of the debtor's offense or by the victim's resulting loss or damage. These criminal restitution payments, though initially paid to COAP, are ultimately remitted to the victim of the defendant's crime. *See In re Mead*, 41 B.R. at 840; *In re Pellegrino*, 42 B.R. at 132. In the present case, the amount of money wrongfully received by Robinson from CDIM was $9,932.95. The amount of restitution that Robinson was ordered to pay was precisely $9,932.95. Thus, defendants admit on this appeal, as they must, that "the restitution [to be paid by Robinson] also had compensatory consequences . . . ." The conclusion is inescapable that Robinson's obligation to make restitution payments to COAP in the exact amount lost by CDIM, which COAP would then remit to CDIM, was designed to be, among other things, compensation for CDIM's actual pecuniary loss.

The fact that Connecticut's probation scheme includes possible conditions of probation that are not compensatory does not detract from the conclusion that criminal restitution, to the extent that it does not exceed the amount of the loss and eventually goes to the victim of the loss, is compensatory. Neither are we persuaded that because the restitutionary condition itself, like other probationary conditions, is intended in part to punish the defendant and to foster his rehabilitation, it may not also be "compensation for actual pecuniary loss" within the meaning of § 523(a)(7). *Cf. United States v. Dudley*, 739 F.2d 175, 177 (4th Cir. 1984) ("[A]n order of restitution, even if in some respects penal, also[ ] has the predominantly compensatory purpose of reducing the adverse impact on the victim."). Certainly nothing in the section or its legislative history suggests that § 523(a)(7) excludes from discharge only debts to governmental units that are *exclusively* compensation for actual pecuniary loss. Such a restrictive interpretation is contraindicated by the very words used to introduce the subsection: the thought that "to the extent" that a debt is of one sort or another different consequences follow means that the draftsmen recognized that the debt itself may fit into more than one category.

We conclude that a debt that has compensation for actual pecuniary loss as at least one of its purposes is not, to the extent that it does not exceed the amount of the loss, excepted from discharge by § 523(a)(7). Given the facts that the Connecticut statutory scheme allows the criminal restitution obligation to be fixed with reference to "the loss or damage caused [by the offense]," that the order here fixed Robinson's debt at precisely the amount she had wrongfully received from CDIM, and that the

restitution payments by Robinson to COAP are forwarded by COAP to CDIM, we conclude that Robinson's debt cannot be classified as one that is "not compensation for actual pecuniary loss." Robinson's debt therefore was not excepted from discharge by § 523(a)(7).

There being no properly invoked provision that prevented the discharge of Robinson's restitution debt, that debt was discharged by the Discharge Order.

C. Relief on Remand

In addition to requesting a judgment declaring that her restitution obligation had been discharged by the Discharge Order, Robinson sought an order enjoining defendants from taking any steps to recover further restitution payments and an order adjudging defendants in contempt of the Discharge Order and the automatic injunction imposed by § 524 of the Code for having attempted to collect restitution payments from her after the entry of the Discharge Order. As noted above, § 524(a)(2) provides that a valid discharge

> operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any . . . debt [discharged under § 727] as a personal liability of the debtor, or from property of the debtor . . . .

Robinson also sought an award of compensatory and punitive damages, costs, and attorney's fees.

Since we have determined that Robinson's restitution debt was discharged by the Discharge Order, that Discharge Order automatically operated as an injunction against defendants' taking any steps to recover further

restitution payments from Robinson. Thus, Robinson's claim for an injunction may be viewed as a request for clarification and particularization of the § 524(a)(2) injunction with respect to her restitution obligation. Given the position taken by COAP and the other defendants in this, and other recent cases, *see In re Cornell*, 44 B.R. 528; *In re Mead*, 41 B.R. 838; *In re Pellegrino*, 42 B.R. 129, we believe that such clarification is warranted to ensure that Robinson is accorded the relief to which the Discharge Order entitled her.

Because defendants have raised various defenses and claims of immunity with respect to Robinson's other claims, none of which has been addressed by the district court, we remand to the district court for consideration of those claims.

CONCLUSION

We reverse the judgment of the district court declaring that Robinson's restitution obligation was not discharged and remand to the district court for (1) an order declaring Robinson's restitution obligation discharged, (2) an order enjoining defendants from taking any steps to recover further restitution payments, and (3) further proceedings not inconsistent with this opinion.

MANSFIELD, *Circuit Judge* (Concurring):

I concur in Judge Kearse's thorough and carefully considered opinion. At the same time I cannot refrain from expressing concern at the unfortunate result compelled by the language of the relevant provisions of the

Bankruptcy Code. The effect in many instances will be to stultify and render useless criminal restitution payments as a means of punishing persons convicted of felonies involving theft or fraudulent procurement of money or property, in this case wrongfully obtaining $9,932.95 in Public Assistance benefits. The convicted criminal will simply use bankruptcy to escape the obligation to make criminal restitution payments ordered by the court. The court will accordingly be forced to impose punishment in the form of a "fine, penalty or forfeiture payable to and for the benefit of a governmental unit" in order to render the obligation non-dischargeable under 11 U.S.C. § 523(a)(7). I see no valid reason for requiring the recipient of criminal restitution payments as a creditor to file objections under 11 U.S.C. § 523(c) to the convicted criminal's being discharged from the obligation to make criminal restitution payments ordered by the court when he or she is not required to do so in order to prevent discharge of the criminal's obligation to pay a fine, penalty or forfeiture.

For these reasons I hope that Congress will remedy this unfortunate loophole by amending 11 U.S.C. § 523(a)(7) to make criminal restitution payments non-dischargeable in bankruptcy.

Supreme Court, U.S.
FILED
JAN 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1033

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

JOHN J. KELLY,
CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL.,
Petitioner,

v.

CAROLYN ROBINSON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION
WITH ATTACHED APPENDIX

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STATEMENT OF THE CASE

The respondent, Carolyn Robinson, agrees generally with the statement of the case as set forth in the petition, pages 1 through 8, except for the first paragraph of the statement in which the petitioners characterize the basic question raised by their petition, and except for the omission of a factual matter that has a bearing on the petition.

The respondent maintains that the basic question raised by this petition is whether the prepetition criminal restitution obligation, duly listed and scheduled in the respondent's bankruptcy, was a "debt" as that term is defined in the Bankruptcy Code, and if so, whether that debt was discharged in this particular bankruptcy case.

The factual matter omitted from the petitioners' statement of the case involves the stay of state court proceedings agreed to by the parties and ordered by the Connecticut Superior Court. Shortly after the respondent brought the present adversary proceeding in the bankruptcy court seeking a determination of the dischargeability of her criminal restitution obligation and other relief, the Connecticut Office of Adult Probation (COAP) brought a complaint against her in Connecticut Superior Court for violation of probation, claiming that she was in arrears on her $100 monthly restitution payments and claiming as well that respondent's restitution obligation was not dischargeable in her bankruptcy. On April 26, 1984, upon agreement of respondent, COAP and the Chief State's Attorney, the Connecticut Superior Court ordered a

stay of proceedings in COAP's complaint pending the final determination, including the final determination of any appeals, of the respondent's adversary proceeding in the bankruptcy court. Respondent's App. at 1A-6A.

SUMMARY OF ARGUMENT

1. The decision of the Second Circuit Court of Appeals in this case is a narrow one, based on the peculiar facts of this particular case; the decision does not have a significant impact upon the administration of criminal justice.

2. The Second Circuit was correct in deciding that the respondent's pre-petition criminal restitution obligation was a "debt" as that term is defined in the Bankruptcy Code.

3. The petitioners could have obtained a determination from the bankruptcy court, pursuant to 11 U.S.C. §§523(a)(4) and 523(c), that the criminal restitution obligation was nondischargeable in respondent's bankruptcy; however, petitioners failed to do this because they failed to file a complaint in the bank-

ruptcy court seeking such a determination within the required time, or at any time. Accordingly, the debt was discharged.

4. Petitioners' reliance upon 11 U.S.C. §523(a)(7) for their claim that the criminal restitution obligation was non-dischargeable was erroneous because the restitution obligation served the function of providing "compensation for actual pecuniary loss."

5. The decision of the Second Circuit in this case does not conflict with any of the decisions of other U.S. Courts of Appeals.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THERE ARE NO SPECIAL OR IMPORTANT CIRCUMSTANCES REQUIRING THE SUPREME COURT'S REVIEW OF THIS ACTION.

The present case decided by the Second Circuit Court of Appeal does not involve a decision which conflicts with this Court's prior decisions or which conflicts with prior decisions by other Courts of Appeals. Nor does this case involve a broad question of federal law which should be reviewed by this Court. Instead, this case involves a narrow question of law based upon its own set of facts. The Second Circuit decided this question of federal statutory law consistent with the language and meaning of the statute. As such, petitioner cannot demonstrate any special circumstances requiring this Court's review of this case.

The underlying facts in this case are not in dispute and are set forth in detail in the Petition, pages 1-8 and in the

Petitioners' Appendix, pages 3A-5A and 31A-34A. The respondent, Carolyn Robinson, filed her voluntary Chapter 7 bankruptcy petition and schedules on February 5, 1981. In her schedules she listed the petitioners, Connecticut Department of Income Maintenance (CDIM) for her indebtedness in the amount of $6,000 for public assistance benefits and Connecticut Office of Adult Probation (COAP) for her indebtedness in the amount of $9,932.95 based upon a criminal restitution order. The criminal restitution order had resulted from a larceny conviction (based upon respondent's wrongful receipt of public assistance benefits while she was simultaneously receiving Social Security benefits), and had been ordered by the Connecticut Superior Court on November 14, 1980.

On February 20, 1981, the bankruptcy court notified both CDIM and CCAP of the respondent's Chapter 7 bankruptcy petition, and informed each of them that April 27, 1981, was the last day for the filing of objections to discharge and "complaints to determine the dischargeability of any debt pursuant to 11 U.S.C. §523(c)." This gave CDIM and COAP each a total of 66 days for the filing of such a complaint. If petitioners had needed additional time they could have requested it from the bankruptcy court pursuant to Bankruptcy Rule 4007(c). Neither CDIM nor CCAP ever filed any complaint to determine the dischargeability of respondent's criminal restitution obligation. Accordingly, pursuant to 11 U.S.C. §523(c), the petitioners waived their rights to object to the dischargeability of the respondent's criminal restitution obligation, and that debt was, therefore, discharged.

It is well recognized that a debt which might otherwise be nondischargeable in bankruptcy under §523(a)(2) (fraud, false pretenses or false representations), §523(a)(4) (larceny, embezzlement, defalcation or fraud) or §523(a)(6) (willful and malicious injury) will nevertheless be discharged in the debtor's bankruptcy unless a timely complaint is filed in the bankruptcy court objecting to the dischargeability of that debt. 11 U.S.C. §523(c); Bankruptcy Rule 4007(c); In re Gutierrez, 15 B.R. 268 (N.D. Ill. 1981); In re Hawley, 23 B.R. 236 (Bankr. E.D. Mich. 1982); In re Rowan, 15 B.R. 834 (Bankr. N.D. Ohio 1981). Essentially, this is a major point being made by the Second Circuit in the present case. Petitioners' App. at 48A-50A. Since the petitioners never filed any complaint in the bankruptcy court

objecting to the dischargeability of the criminal restitution obligation, that debt was discharged.

The petitioners argue that the pre-petition criminal restitution obligation should not be considered a "debt," and therefore the discharge provisions of the Bankruptcy Code should not apply. However, "debt" is defined in the Code as "liability on a claim," 11 U.S.C. §101(11), and "claim" is defined in an extremely broad manner. See 11 U.S.C. §101(4); see also Ohio v. Kovacs, 105 S. Ct. 705 (1985). The legislative reports indicate that the broadest possible definition was intended for the term "claim." The Second Circuit's analysis of the meaning of the terms "debt" and "claim" is extremely thorough and persuasive. Petitioners' App. at 34A-48A.

It is clear that the restitution obligation in this case is a "debt" as definded in the Bankruptcy Code.

The petitioners' second argument is that even if the restitution obligation is a "debt," it should be considered nondischargeable under §523(a)(7). Since nondischargeable debts of the §523(a)(7) variety are not subject to the requirements of §523(c), the petitioners would not be required to file a complaint in the bankruptcy court objecting to dischargeability. For a debt to be nondischargeable under §523(a)(7) it must be a "fine, penalty or forfeiture," and it must meet each of the following three criteria:

1. it must be payable to a governmental unit;

2. it must be payable for the benefit of a governmental unit; and

3. it must not be compensation for actual pecuniary loss.

Since many criminal restitution obligations are payable for the benefit of a private party victim, they could never be nondischargeable under §§523(a)(7). In the present case, although the restitution obligation is payable for the benefit of a state agency victim, it still does not come within the nondischargeability ambit of §523(a)(7) because it represents "compensation for actual pecuniary loss." The amount of the restitution order was $9,932.95; this is the precise amount claimed to have been wrongfully received by the respondent for which she was prosecuted. This amount was payable for the benefit of the state agency victim. Although fines and penalties which do not benefit the victim serve the functions of punishment and rehabilitation, the function of restitution as such is to provide the victim compensation for pecuniary loss. See Conn. Gen.

Stat. §53a-30(a)(4)(1985); and see United States v. Dudley, 739 F.2d 175 at 177 (4th Cir. 1984).

Petitioners argue that if §523(a)(7) does not apply to criminal restitution obligations there may be occasions in the future when certain criminal restitution obligations would fall outside the scope of the various nondischargeable debt categories listed under §523(a) and would, therefore, be discharged in bankruptcy. This argument does not apply to the present case since the present restitution obligation would have been nondischargeable under either §523(a)(2) or §523(a)(4) if petitioners had filed a complaint in the bankruptcy court. Petitioners cite at p. 22 of their Petition examples such as restitution arising from crimes of reckless burning or negligent assault with a deadly weapon. Possibly these may be nondischargeable under §523(a)(6) as willful and malicious

injuries. However, to the extent that there are a few restitution orders that are ultimately dischargeable in bankruptcy it simply means that the policies and priorities established by Congress through the Bankruptcy Code shall prevail; this results from the impact of the supremacy clause. See Perez v. Campbell, 91 S. Ct. 1704, 1708-1713 (1971).

Petitioners finally argue that the general doctrine enunciated in Younger v. Harris, 401 U.S. 37 (1971), including the notion of a proper respect for state functions, should govern and should lead to a determination that criminal restitution obligations cannot be discharged in bankruptcy. The Younger doctrine does not relate to the issue of the dischargeability of debts in bankruptcy. Debts owing to states and debts resulting from state court judgments are clearly

dischargeable in bankruptcy. See 11 U.S.C. 524(a). The Younger doctrine involves the issue of abstention by a federal court from enjoining a state court proceeding. However, in the present case the state court ordered a stay of the criminal proceedings pending a final determination of the bankruptcy dischargeability question by the federal court. Respondent's App. at 1A-6A. Accordingly, the Younger doctrine does not apply to this case.

II. THE DECISION OF THE SECOND CIRCUIT DOES NOT CONFLICT WITH ANY OF THE DECISIONS OF OTHER COURTS OF APPEALS

The present case involves the question of the dischargeability of a prepetition criminal restitution obligation duly listed and scheduled in the respondent's bankruptcy. None of the five Courts of Appeals decisions cited by petitioners involves a criminal restitution obligation

actually in effect on the date of filing the debtor's bankruptcy. This is a significant distinction since a debt must already be in existence at the time of the filing of a bankruptcy petition in order for it to be affected by the bankruptcy discharge. 11 U.S.C. §727(b).

Both United States v. Carson, 669 F.2d 216 (5th Cir. 1982) and United States v. Alexander, 743 F.2d 472 (7th Cir. 1984) were concerned with criminal restitution orders entered after the debtor had obtained a dishcarge in bankruptcy. These cases did not involve a prepetition restitution obligation wherein a listed creditor failed to contest dischargeability.

The cases of In re Davis, 691 F.2d 176 (3rd Cir. 1982), Barnette v. Evans, 673 F.2d 1250 (11th Cir. 1982) and McDonald v. Burrows, 731 F.2d 294 (5th Cir. 1984) all involved the Younger doctrine of

abstention and held that a federal court should not enjoin a state criminal proceeding. None of these cases holds that a duly listed and scheduled prepetition restitution order is nondischargeable in bankruptcy. In fact, the Davis opinion strongly suggests that the entry of a criminal restitution order in that case would conflict with the Bankruptcy Code, but the court abstains under the Younger doctrine. See also In re Goree, 12 B.C.D. 746 (Bankr. W.D. Ky. 1985).

None of these five Courts of Appeals decisions conflicts with the decision of the Second Circuit in the present case.

III. CONCLUSION

This case does not require this Court's review. Indeed the decision of the Second Circuit Court of Appeals is correct

and proper, and therefore the petition for writ of certiorari should be denied.

Respectfully submitted,

FRANCIS X. DINEEN
NEW HAVEN LEGAL ASSISTANCE
ASSOCIATION, INC.
426 State Street
New Haven, CT 06510
777-4811

Counsel for Respondent

No. 85-1033

In The

Supreme Court Of The United States

OCTOBER TERM, 1985

JOHN J. KELLY,
CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL.,
Petitioner,

v.

CAROLYN ROBINSON,
Respondent.

APPENDIX

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A. Motion For Stay, filed in case of State of Connecticut v. Carolyn Robinson, Dkt. No. CR6-185844..... 1A

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NO. CR6-185844

STATE OF CONNECTICUT	:	SUPERIOR COURT
		G.A.#6,
V.	:	AT NEW HAVEN
CAROLYN ROBINSON	:	APRIL 25, 1984

MOTION FOR STAY

The defendant, Carolyn Robinson, moves for a stay of proceedings in this Court with regard to the complaint of Viclation of Probation filed against her, and in support of her motion she represents the following:

1. On February 5, 1981, the defendant, Carolyn Robinson, filed her Chapter 7 petition for relief in bankruptcy in the U.S. Bankruptcy Court for the District of connecticut, Case No. 5-81-114, and was granted an order for relief pursuant to 11 U.S.C. §§301 and 362.

2. Duly scheduled in her petition and schedules was her debt to the State of Connecticut Department of Income Maintenance, and the Office of Adult Probation. Notice was sent by the U.S. Bankruptcy Court to each of these entities on February 20, 1981.

3. Prior to the last date for filing a complaint to determine dischargeability of a debt, pursuant to 11 U.S.C. §523(c), no such complaint was filed.

4. The defendant received her Discharge in Bankruptcy on May 14, 1981.

5. The defendant's debt to the State of Connecticut Department of Income Maintenance, and the Office of Adult Probation, was discharged by her Discharge in Bankruptcy. Pursuant to 11 U.S.C. §524, the Discharge voids any judgment at any

time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under 11 U.S.C §727, and further operates as an injunction against the continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor.

6. The defendant has already filed and served a Complaint to Determine Dischargeability of Debt in order to obtain a judicial determination that the restitution debt, involved in this instant Superior Court probation complaint, was discharged in defendant's bankruptcy. Said complaint is pending before the U.S. Bankruptcy Court, Adversary No. 205-5-84-0063, and a trial date has been set for May 18, 1984. The State of Connecticut is a party in said

action in the Bankruptcy Court, and the defendant is seeking both declara-tory and injunctive relief therein.

7. In view of the fact that the issues presently being litigated in the U.S. Bankruptcy Court will be determinative of all or some of the issues involved in this instant Superior Court probation complaint, the defendant is requesting that this instant matter be stayed until there is a final decision, including a final decision on any appeals that may be taken by either party, rendered on the defendant's Complaint pending in the Bankruptcy Court.

8. The defendant recognizes that, pursuant to Conn. Gen. Stat. §53a-31(b), the period of her sentence of probation is interrupted from the date of the issuance of the Notice to Appear (April 16, 1984)

through the entire period of the stay until a final determination as to the alleged violation of probation has been made by this Court.

THE DEFENDANT, CAROLYN ROBINSON

BY: _____
FRANCIS X. DINEEN
HER ATTORNEY
399 Temple Street
New Haven, CT 06511
777-4811

O_R_D_E_R

The foregoing motion having been duly presented to this Court, it is hereby

ORDERED: that the proceedings in this Complaint of Violation of Probation be and hereby are stayed pending the final determination, including the final determination of any appeals that may be taken by any party, of the defendant's Complaint, Adv. No. 205-5-84-0063, presently pending in the

U.S. Bankruptcy Court. Pursuant to Conn. Gen. Stat. §53a-31(b), the period of the defendant's sentence of probation is interrupted during the period of this stay of proceedings until a final determination of the alleged violation of probation has been made by this Court.

Sherman Drutman, J.
JUDGE OF THE SUPERIOR COURT

CERTIFICATION

This is to certify that on the 26th day of April, 1984, a copy of the foregoing was handed to Attorney Carl Schuman, Assistant State's Attorney.

FRANCIS X. DINEEN

Supreme Court, U.S.
FILED
APR 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 85-1033

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

JOHN J. KELLY,
CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL.,
Petitioners,

v.

CAROLYN ROBINSON,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

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Counsel of Record for
Respondent

Petition for Certiorari—Filed December 13, 1985
Certiorari Granted—February 24, 1986

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3/22	REQUEST for Production filed by Debtor
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4/10	MOTION to separate claim for Attorneys fees and for purposes of trial filed by Joanne S. Faulkner—GRANTED 5/15/84 (cc: Faulkner; Schuman—5/15/84) ca
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4/16	NOTICE OF APPEAL filed by Francis Dineen, Esq. copy of Notice of Appeal mailed to Carl Schuman, Esq., Director of Adult Probation Austin J. McGuigan, Chief State's Attorney on 4/17/84
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5/30	MOTION for permission to amend answers of the defendant Commissioners of the department of income Maintenance and administrative services filed by Edward Reynolds, Esq.

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5/30		AMENDMENT TO ANSWER OF THE DEFENDANT COMMISSIONERS of the Departments of Income Maintenance and Administrative Services filed by Edward Reynolds
6/20		PLAINTIFF'S Supplemental Brief
8/31		MEMORANDUM OF FINDINGS, CONCLUSIONS OF LAW AND PROPOSED ORDER by Judge Shiff to Judge Daly
9/4		JUDGMENT and MEMORANDUM AND PROPOSED ORDER cc: Attys. Dineen; Faulkner; Reynolds and Schuman and Meister signed by Judge Daly
9/17	#11	NOTICE OF APPEAL filed by Joanne S. Faulkner, Esq.
9/19		COPY OF Notice of Appeal #11 mailed to Edward F. Reynolds on behalf of Commissioner, Department of Income Maintenance & Commissioner of Administrative Services Bureau of Collection services and to Carl Schuman, Assistant State's Attorney, on behalf of Austin J. McGuigan, Chief State's Attorney Division of Criminal Justice, Judicial Department and Director, office of Adult Probation on 9/19/84
9/20	#12	NOTICE OF Appeal by Agreement Directly to the Court of Appeals under 28 U.S.C. sec. 1293(b)
9/21		COPY of Receipt of $5.00 No. 3687238, copy of Notice of Appeal, Notice of Appeal by Agreement directly to the Court of Appeals under 28 U.S.C. sec. 1293(b) sent to the U.S. Court of Appeals for the Second Circuit and Docket Entries & Cover Letter
9/21	#13	DESIGNATION OF EXHIBITS filed by Francis Dineen, Esq. on behalf of Carolyn Robinson, Esq.

1984		
9/26	#14	DEFENDANT'S Motion for attorney's fees filed by Carl Schuman, Esq. on behalf of Director, Office of Adult Probation & Austin J. McGuigan, Esq.
9/26	#15	MEMORANDUM IN SUPPORT of Defendant's Motion #14 filed by Carl Schuman, Esq. on behalf of Austin J. McGuigan, Esq. & Director, Office of Adult Probation
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1986		
2/24		PETITION For Writ of Certiorari granted by United States Supreme Court

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

In Re:)

CAROLYN EVONNE ROBINSON)

Petitioner)

APPLICATION TO PAY FILING FEES IN INSTALLMENTS

1. Applicant is filing herewith a petition commencing a voluntary case under Title 11, United States Code.

2. She has no money with which to pay the fee in this matter.

3. She has not paid any money to her attorney for services rendered or to be rendered in connection with this case or any pending case under Title 11, United States Code.

4. She will pay the fee within three months.

WHEREFORE, applicant prays that she be permitted to pay this filing fee in installments.

/s/ Carolyn E. Robinson

CAROLYN EVONNE ROBINSON

DATED Jan. 21-81

UNITED STATES BANKRUPTCY COURT

DISTRICT OF CONNECTICUT

In re

CAROLYN EVONNE ROBINSIN
S.S. No. 049-46-5091

Debtor

VOLUNTARY CASE: DEBTOR'S PETITION

1. Petitioner's post-office address is 282 Terrace Avenue Apt. C2, West Haven, CT 06516.

2. Petitioner has resided within this district for the preceding 180 days.

3. Petitioner is qualified to file this petition and is entitled to the benefits to Title 11, United States Code, as a voluntary debtor.

WHEREFORE, petitioner prays for relief in accordance with Chapter 7 of Title 11, United States Code.

Signed: _____

JOANNE S. FAULKNER
Attorney for Petitioner
399 Temple Street
New Haven, Connecticut 06511
777-4811

I, Carolyn Evonne Robinson, the petitioner named in the foregoing petition, certify under penalty of perjury that the foregoing is true and correct. Executed on Jan. 21, 1981.

Signature: Carolyn E. Robinson

Carolyn Evonne Robinson

UNITED STATES BANKRUPTCY COURT

DISTRICT OF CONNECTICUT

IN RE:	)	
CAROLYN EVONNE ROBINSON	)	
	)	Case No.
	)	
Debtor	)	

STATEMENT OF ATTORNEY RE COMPENSATION

No compensation has been paid or promised to the undersigned by the debtor for services rendered or to be rendered in connection with this case.

The undersigned is a salaried employee of the New Haven Legal Assistance Association, Inc., and it is in that capacity that she is representing the debtor in this matter.

/s/ Joanne S. Faulker

JOANNE S. FAULKNER
Attorney for the Debtor
399 Temple Street
New Haven, Connecticut 06511
777-4811

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

ORDER FOR MEETING OF CREDITORS AND FIXING TIME FOR FILING OBJECTIONS TO DISCHARGE AND FOR FILING COMPLAINTS TO DISCHARGEABILITY OF CERTAIN DEBTS, COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY

To the following debtors, their creditors, and other parties in interest:

An order for relief under 11 U.S.C. Chapter 7 has been entered upon petitions filed by the following debtors, and Daniel Meister, 71 East Avenue, Norwalk, Conn. 06851 is appointed interim trustee in each case, to wit:

Pet. No.	Debtor	Pet. Filed	Time of Meeting of Creditors
	* * *		
	(Names omitted in printing.)		
5-81-114	Carolyn Evonne Robinson 282 Terrace Ave. Apt. C-2 West Haven, Conn. 06516	2/5/81	11:30 A.M.

DO NOT FILE CLAIMS AT THIS TIME. THE ABOVE-ENTITLED CASES HAVE BEEN DESIGNATED AS PROBABLE NO-ASSET CASES. YOU WILL BE NOTIFIED AT A LATER DATE OF THE TIME WITHIN WHICH TO FILE CLAIMS IF SUFFICIENT FUNDS ARE RECOVERED FOR PAYMENT OF DIVIDEND CREDITORS

IT IS ORDERED, and notice is hereby given, that:

1. Respective meetings of creditors of said debtors pursuant to 11 U.S.C. section 341(a) shall be held at ROOM 320, Bankruptcy Court, United States Court House, 915 Lafayette Boulevard, Bridgeport, CONNECTICUT on *March 17, 1981* at the times set forth above.

2. The debtors shall appear with their attorneys of record, in person, (*or, if the debtor is a partnership,* by a general partner, *or, if the debtor is a corporation,* by its president *or other executive officer*) at the meetings of creditors set forth above for the purpose of being examined.

3. *April 27, 1981* is fixed as the last day for the filing of objections to discharge of said debtors.

4. *April 27, 1981* is fixed as the last day for the filing of complaints to determine dischargeability of any debt pursuant to 11 U.S.C. section 523(c).

You are further notified that

The meeting may be continued or adjourned from time to time by notice at the meeting without further written notice to creditors.

At the meetings, the creditors may file their claims, (elect a trustee as permitted by law, designate a person to supervise the meeting, elect a committee of creditors), examine the debtor, and transact such other business as may properly come before the meeting.

As a result of the filing of the petition, certain acts and proceedings against the debtors and their property are stayed as provided in 11 U.S.C. section 362(a).

If no objection to the discharge of the debtors are filed on or before the last day fixed therefor as stated in subparagraph 3 above, the debtors will be granted their discharges. If no complaint to determine the dischargeability of a debt under clause (2), (4), or (6) of 11 U.S.C. section 523(a) is filed within the time fixed therefor as stated in subparagraph 4 above, the debt may be discharged.

It appears from the schedules of the debtors that there are no assets from which any dividend can be paid to creditors.

It is unnecessary for any creditor to file his claim at this time in order to share in any distribution from the estate. If it subsequently appears that there are assets from which a dividend may be paid, creditors will be so notified and given an opportunity to file their claims.

Unless the court extends the time, any objection to the debtors' claim of exempt property (Schedule B-4) must be filed within 15 days after the above date set for the meetings of creditors.

Dated: *February 20, 1981*

BY THE COURT

ROBERT L. KRECHEVSKY
Bankruptcy Judge

By: Ethel Petrides
DEPUTY IN CHARGE

*X ONLY THE DEBTOR WHOSE NAME IS MARKED ABOVE HAS LISTED YOU AS A CREDITOR

Bankruptcy Court
United States Court House
Room 319
915 Lafayette Boulevard
Bridgeport, Conn. 06604

United States Bankruptcy Court

For the _____ District of Connecticut

In re

CAROLYN EVONNE ROBINSON Case No. 5-81-114

Debtor*

DISCHARGE OF DEBTOR

It appearing that the person named above has filed a petition commencing a case under title 11, United States Code on February 5, 1981, that an order for relief was entered under chapter 7 and that no complaint objecting to the discharge of the debtor was filed within the time fixed by the court, it is ordered that

1. The above-named debtor is released from all dischargeable debts.

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

(a) debts dischargeable under 11 U.S.C. § 523;

(b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2), (4) and (6) of 11 U.S.C. § 523(a);

(c) debts determined by this court to be discharged under 11 U.S.C. § 523.

3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void

by paragraph 2 above are enjoined from commencing, continuing or employing any action, process or act to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor, whether or not discharge of such debt is waived.

Dated: May 14, 1981

BY THE COURT

/s/ Alan H.W. Shiff

Bankruptcy Judge
Alan H.W. Shiff

IN THE
UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF CONNECTICUT

IN RE: CAROLYN ROBINSON, Debtor	
CAROLYN ROBINSON, Plaintiff	
V.	CASE NO. 5-81-114
DIRECTOR, DEPARTMENT OF ADULT PROBATION; DIRECTOR, DIVISION OF CRIMINAL JUSTICE, JUDICIAL DEPARTMENT; COMMISSIONER, DEPARTMENT OF INCOME MAINTENANCE; COMMISSIONER OF ADMINISTRATIVE SERVICES, BUREAU OF COLLECTION SERVICES, Defendants	ADV. NO. 84-63

AMENDED COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

FIRST COUNT

1. This complaint is brought to determine the dischargeability of the plaintiff's restitution debt owing to the State of Connecticut, and for appropriate relief.

2. This court has jurisdiction pursuant to 11 U.S.C. sec. 105 and 28 U.S.C. secs. 1343 and 1471.

3. On February 5, 1981, plaintiff filed her petition in bankruptcy and was granted an order for relief pursuant to 11 U.S.C. sec. 362.

4. Duly scheduled in her petition was a debt to the State of Connecticut Department of Income Maintenance, and the Commission on Adult Probation. Notice was sent by the Court to each of these entities, in February, 1981.

5. Prior to the last date for filing a claim of dischargeability, no such claim was filed.

6. Plaintiff received her discharge in bankruptcy on May 14, 1981.

7. Plaintiff's debt to the state of Connecticut Department of Income Maintenance was thereby discouraged.

8. On May 20, 1981, plaintiff's attorney sent the letter attached hereto as Exhibit A, by certified mail, to the Office of Adult Probation, with a copy to Michael Arcari, Esquire, Assistant Attorney General.

9. The restitution debt arose out of Mrs. Robinson's conviction for wrongful receipt of Public Assistance benefits in the amount of $9,932.95 at a time when she was also receiving Social Security benefits.

10. On November 14, 1980, Judge Kinney imposed on Mrs. Robinson a sentence of not less than one year, nor more than three years, execution suspended and five years probation. A special condition of probation was imposed as follows: "restitution of $9,932.95 at $100 per month commencing 1-16-81."

11. On February 6, 1984, Mr. Benevento, of the Office of Adult Probation, informed plaintiff that her restitution debt was not dischargeable in bankruptcy, and she must begin to make restitution payments under threat of rearrest and incarceration for violation of probation.

12. On February 21, 1984, Mr. Benevento, Senior Probation Officer, and Leonard Russman, District Manager, sent Mrs. Robinson the letter attached hereto as Exhibit B.

13. By letter dated March 19, 1984, said individuals, on behalf of defendant, requested that plaintiff resume payments. A copy is annexed hereto as Exhibit C.

14. Mrs. Robinson, a widow, was greatly distressed by the threat of the Probation Department in view of her need to care for her minor children, and obtain the fresh start she had received in bankruptcy.

15. Plaintiff's attorney requested defendant Director of the Office of Adult Probation to withhold further action against Mrs. Robinson pending the decision in the case now before this court on the same issue. A copy of the letter is attached hereto as Exhibit D.

16. By letter dated February 10, 1984, defendant expressed his intention "to proceed with the collection of restitution." A copy of the letter is attached hereto as Exhibit E.

SECOND COUNT

1. The allegations of paras. 1–16 of the First Count are repeated and realleged as if fully set forth herein.

17. Defendant Director of the Office of Adult Probation has acted and threatened to act without ascertaining from this Court defendant's obligations in the fact of the automatic stay and discharge herein.

18. Defendant's acts or threatened acts are in violation of this Court's action discharging the debtor, and of 11 U.S.C. secs. 524 and 525.

THIRD COUNT

1. The allegations of paras. 1-18 of the Second Count are repeated and realleged as if fully set forth herein.

19. Said defendant's actual or threatened actions have deprived and are depriving plaintiff of her civil rights, privileges, or immunities under color of state law, in violation of 42 U.S.C. sec. 1983.

WHEREFORE, plaintiff claims an order declaring that the larceny and restitution debt herein is dischargeable and has been discharged; an order declaring that the debt to the defendant Department of Income Maintenance is dischargeable and has been discharged; and order enjoining the defendants from taking any steps, whether directly or indirectly, to obtain payment of the restitution or otherwise enforce the criminal judgment; an order assessing attorneys' fees and costs against defendant Director of the Office of Adult Probation pursuant to the equitable powers of this court, and pursuant to 42 U.S.C. sec. 1988; appropriate orders for contempt and violation of plaintiff's civil rights, including compensatory damages, punitive damages, and attorneys' fees payable to New Haven Legal Assistance Association; and such other and further relief as this Court deems just and equitable.

THE PLAINTIFF

BY: /s/ Joanne S. Faulkner

JOANNE S. FAULKNER
HER ATTORNEY
399 Temple Street
New Haven, CT 06511
777-4811

May 20, 1981

Office of Adult Probation
188 Bassett Street
New Haven, CT 06511

ATTENTION: Mr. Vincent Benevento

Re: Carolyn Robinson, Case No. CR6-185844
Bankruptcy No. 5-81-114

Dear Mr. Benevento:

As you are aware, Carolyn Robinson filed a petition in bankruptcy on February 5, 1981. She received her discharge on May 14, 1981.

Pursuant to 11 U.S.C. § 523(a)(7), the amount ordered paid to the State by way of restitution has been discharged in bankruptcy. The discharge voids the restitution order, since it is a determination of the personal liability of the debtor. 11 U.S.C. § 524.

The State is prohibited from discriminating against Ms. Robinson because of nonpayment of a debt which has been discharged in bankruptcy pursuant to 11 U.S.C. § 525.

Because of all of the above, I have advised Ms. Robinson that she need make no further payments under the restitution order. Upon discharge, there is no longer anything owing under the order for probation, and it is my position that the repayment conditions thereof have been fully satisfied.

If you disagree with the above, please let me know immediately. In the event of such disagreement, the State's recourse is to obtain a ruling from the Bankruptcy Court as to the dischargeability of the restitution order.

* * *

(Certified mail receipt omitted in printing.)

EXHIBIT A

Any other action will subject the State to serious and substantial liability.

Sincerely,

(Mrs.) Joanne S. Faulkner
Attorney at Law
Legal Aid Bureau

cc: Carolyn Robinson
JSF:ls/3/15

CONNECTICUT JUDICIAL DEPARTMENT
OFFICE OF ADULT PROBATION
DISTRICT IV

965 Dixwell Avenue, Hamden, Connecticut 06514

Office Telephone: (203) 789-7876
Centrex 153-7876

February 21, 1984

Ms. Carolyn Robinson
635 Fitch Street
Hamden, Conn. 06514

Dear Ms. Robinson:

On 11-14-80 you were sentenced in Superior Court, GA-6, New Haven, Connecticut after having plead guilty to Larceny 2nd. At that time, the Honorable Frank Kinney imposed a sentence of not less than 1 year, nor more than 3 years, execution suspended and 5 years probation. Special conditions of probation imposed as follows: "Restitution of $9,932.95 at $100 per month commencing 1-16-81."

We are aware of Bankruptcy Proceedings on your behalf; however, the policy of this office as indicated by the Director of the Connecticut Judicial Department Office of Adult Probation is as follows: "The Office of Adult Probation will adopt a position that the condition of probation concerning restitution is valid and not dischargeable. The probationer must know that we intend to enforce the court order to the fullest extent possible."

Acting under instructions of my District Manager, Leonard Russman, I am requesting that you resume monthly payments of $100 as ordered by the Superior Court on 11-14-80. We can discuss this further on your report date in March.

Payments had been received in a prompt and orderly fashion to 5-4-81 — last payment — total $450.00 which leaves a balance of $9,482.95.

Sincerely

/s/ Vincent J. Beneventc

Vincent J. Benevento
Senior Probation Officer

/s/ Leonard Russman

Leonard Russman
District Manager

VJB/1f

EXHIBIT B

CONNECTICUT JUDICIAL DEPARTMENT
OFFICE OF ADULT PROBATION
DISTRICT IV

965 Dixwell Avenue, Hamden, Connecticut 06514

Office Telephone: (203) 789-7876
Centrex 153-7876

March 19, 1984

Ms. Carolyn Robinson
635 Fitch Street
Hamden, Connecticut 06514

Dear Ms. Robinson:

As you have been informed, the policy of this Office as indicated by the Director of the Connecticut Judicial Department, Office of Adult Probation, is as follows: "The Office of Adult Probation will adopt a position that the condition of probation concerning restitution is valid and not dischargeable. The probationer must know that we intend to enforce the Court order to the fullest extent possible."

Acting under the instruction of my District Manager, Mr. Leonard Russman, I am requesting that you resume a payment of no less than one hundred dollars ($100.00) as of April 1, 1984. It is expected that a payment be paid by that date and thereafter on a monthly basis on or by the first day of each month. At this point, four hundred fifty dollars ($450.00) has been paid and an arrearage of three thousand four hundred fifty dollars ($3450.00) is due.

In the event that our order is ignored and no payment is made, you will be brought before the Court via a "Notice to Appear." We can discuss this further on your next reporting date.

Sincerely,

/s/ Vincent J. Benevento

Vincent J. Benevento
Senior Probation Officer

/s/ Leonard Russman

Leonard Russman
District Manager

VJB/olc

EXHIBIT C

399 TEMPLE STREET
NEW HAVEN, CONNECTICUT 06511-9990
TELEPHONE (203) 777-4811

February 6, 1984

Terry Capshaw, Director
Office of Adult Probation
643 Maple Avenue
Hartford, CT 06114

Dear Mr. Capshaw:

I respectfully request you to rescind your recent memo advising your staff that a restitution order is not dischargeable in bankruptcy, and directing vigorous enforcement of restitution debts in spite of bankruptcy.

The matter is presently being litigated in the Bankruptcy Court. The majority of cases under the 1979 Bankruptcy Code support the dischargeability of such a debt. Your Department's brief relies principally on pre-code cases, and ignores the specific, new, provisions of 11 U.S.C. § 523.

Accordingly, it seems premature for you to make a determination which may turn out to be wrong. If it is wrong, you may well be subjecting yourself and your staff to penalties for contempt of court, including recompense for the litigation caused by the need to apply to the Bankruptcy Court for protection. Your attorney should talk to Assistant Attorney General Les McCallum, who has had recent experience in this regard.

Please let me have your response by February 15, 1984, so I will know how to proceed.

Sincerely,

/s/ Joanne S. Faulkner (nt)
Joanne S. Faulkner
Attorney at Law

JSF:nt
CERTIFIED RETURN
RECEIPT REQUESTED
cc: Vincent Benevento
Carl Schuman
Carolyn Robinson

EXHIBIT D

CONNECTICUT JUDICIAL DEPARTMENT
OFFICE OF ADULT PROBATION
ADMINISTRATIVE OFFICE

643 Maple Avenue, Hartford, Connecticut 06114

Telephone: (203) 566-8350

February 10, 1984

Ms. Joanne S. Faulkner
Attorney at Law
New Haven Legal Assistance Assoc., Inc.
399 Temple Street
New Haven, CT 06511-9990

Dear Ms. Faulkner:

Your letter of February 6, 1984 has been discussed with the attorney from the Chief State's Attorney's Office who is representing us in these matters concerning the dischargeability of restitution orders in bankruptcy.

Mr. Schuman has indicated that he will talk to Les McCallum and will then submit something to you in writing on the subject of their conversation. In the meantime, we intend to proceed with the collection of restitution in the cases which thus far have been brought to our attention.

Very truly yours,

/s/ Terry S. Capshaw
Terry S. Capshaw
Director

TSC:t

EXHIBIT E

UNITED STATES BANKRUPTCY COURT

DISTRICT OF CONNECTICUT

IN RE CAROLYN ROBINSON	:	NO. 5-81-114
CAROLYN ROBINSON	:	ADV. NO.
V.		
DIRECTOR, OFFICE OF ADULT PROBATION, ET AL.	:	APRIL 12, 1984

AMENDED ANSWER

1. Admitted, except as to words "debt" and "appropriate," which are denied.

2. Denied.

3. Admitted.

4. Denied as to first sentence. Admitted as to second sentence.

5. Admitted.

6. Admitted.

7. Denied.

8. Admitted.

9. Admitted except as to word "debt," which is denied.

10. Admitted.

11. Denied.

12. Admitted.

13. Admitted.

14. No knowledge or information.

15. Admitted.

16. Admitted.

17. Denied.

18. Denied.

19. Denied.

AFFIRMATIVE DEFENSE

Any claim for reimbursement from the state is barred by the eleventh amendment to the federal constitution.

RESPECTFULLY SUBMITTED,

DIRECTOR, OFFICE OF ADULT PROBATION

DIVISION OF CRIMINAL JUSTICE

DEFENDANTS

By /s/ Carl Schuman
CARL SCHUMAN
Assistant State's Attorney
Appellate Unit
Office of the Chief State's Attorney

* * *

(Certification omitted in printing.)

UNITED STATES BANKRUPTCY COURT

DISTRICT OF CONNECTICUT

In Re: CAROLYN ROBINSON, DEBTOR,	
	Case No. 5-81-00114
	Adversary No. 5-84-0063
CAROLYN ROBINSON, PLAINTIFF,	
vs.	
DIRECTOR, DEPARTMENT OF ADULT PROBATION, ET ALS., DEFENDANTS.	April 27, 1984

ANSWER OF THE DEFENDANT COMMISSIONERS

1. Admitted, except as to words "debt" and "appropriate," which are denied.

2. Denied.

3. Admitted.

4. Denied as to first sentence. Admitted as to second sentence.

5. Admitted.

6. Admitted.

7. Denied.

8. Admitted.

9. Admitted except as to word "debt," which is denied.

10. Admitted.

11. Denied.

12. Admitted.

13. Admitted.

14. No knowledge or information.

15. Admitted.

16. Admitted.

17. Denied.

18. Denied.

19. Denied.

FIRST AFFIRMATIVE DEFENSE

Any claim for reimbursement from the state is barred by the eleventh amendment to the federal constitution.

SECOND AFFIRMATIVE DEFENSE

The plaintiffs have alleged no claim against the defendant Commissioners of the Department of Income Maintenance and Administrative Services upon which relief can be granted.

THE DEFENDANTS, COMMISSIONERS OF
INCOME MAINTENANCE AND
ADMINISTRATIVE SERVICES

BY THEIR ATTORNEY
JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

By: /s/ Edward F. Reynolds, Jr.

EDWARD F. REYNOLDS, JR.
ASSISTANT ATTORNEY GENERAL

90 Brainard Road
Hartford, CT. 06114
Telephone: 566-7014

IN THE
UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF CONNECTICUT

IN RE: CAROLYN ROBINSON, Debtor	
CAROLYN ROBINSON, Plaintiff	
V.	CASE NO. 5-81-114
DIRECTOR, DEPARTMENT OF ADULT PROBATION; DIRECTOR, DIVISION OF CRIMINAL JUSTICE, JUDICIAL DEPARTMENT; COMMISSIONER, DEPARTMENT OF INCOME MAINTENANCE; COMMISSIONER OF ADMINISTRATIVE SERVICES, BUREAU OF COLLECTION SERVICES, Defendants	ADV. NO.

REQUEST FOR ADMISSIONS

Plaintiff requests the defendant to admit the following, pursuant to Bankruptcy Rules 7036 and 9011:

1. On February 5, 1981, plaintiff filed her petition in bankruptcy and was granted an order for relief pursuant to 11 U.S.C. sec. 362.

2. Duly scheduled in her petition was a debt to the State of Connecticut Department of Income Maintenance, and the

Adult Probation Department. Notice was sent by the Court to each of these entities, in February, 1981.

3. Prior to the last date for filing a claim of dischargeability, no such claim was filed.

4. Plaintiff received her discharge in bankruptcy on May 14, 1981.

5. Plaintiff's debt to the state of Connecticut Department of Income Maintenance was thereby discharged.

6. On May 20, 1981, plaintiff's attorney sent the letter attached hereto as Exhibit A, by certified mail, to the Office of Adult Probation, with a copy to Michael Arcari, Esquire, Assistant Attorney General.

7. The restitution debt arose out of Mrs. Robinson's conviction for wrongful receipt of Public Assistance benefits in the amount of $9,932.95 at a time when she was also receiving Social Security benefits.

8. On November 14, 1980, Judge Kinney imposed on Mrs. Robinson a sentence of not less than one year, nor more than three years, execution suspended and five years probation. A special condition of probation was imposed as follows: "restitution of $9,932.95 at $100 per month commencing 1-16-81."

9. On February 6, 1984, Mr. Benevento, of the Office of Adult Probation, informed plaintiff that her restitution debt was not dischargeable in bankruptcy, and she must begin to make restitution payments under threat of rearrest and incarceration for violation of probation.

10. On February 21, 1984, Mr. Benevento, Senior Probation Officer, and Leonard Russman, District Manager, sent Mrs. Robinson the letter attached hereto as Exhibit B.

11. By letter dated March 19, 1984, said individuals, on behalf of defendant, requested that plaintiff resume payments. A copy of annexed hereto as Exhibit C.

12. Mrs. Robinson, a widow, was greatly distressed by the threat of the Probation Department in view of her need to care for her minor children, and obtain the fresh start she had received in bankruptcy.

13. Plaintiff's attorney requested defendant Director of the Office of Adult Probation to withhold further action against Mrs. Robinson pending the decision in the case now before this court on the same issue. A copy of the letter is attached hereto as Exhibit D.

14. By letter dated February 10, 1984, defendant expressed his intention "to proceed with the collection of restitution." A copy of the letter is attached hereto as Exhibit E.

THE PLAINTIFF

BY: /s/ Joanne S. Faulkner

JOANNE S. FAULKNER
HER ATTORNEY
399 Temple Street
New Haven, CT 06511
777-4811

* * *

(Certification omitted in printing.)

UNITED STATES BANKRUPTCY COURT

DISTRICT OF CONNECTICUT

IN RE CAROLYN ROBINSON	:	NO. 5-81-114
CAROLYN ROBINSON	:	ADV. NO.
V.		
DIRECTOR, OFFICE OF ADULT PROBATION, ET AL.	:	APRIL 12, 1984

DEFENDANTS' RESPONSE TO PLAINTIFF'S REQUEST FOR ADMISSIONS

The defendants respond to the request for admissions as follows:

Paragraph 1) Admitted.

2) Denied as to first sentence. Admitted as to second sentence.

3) Admitted.

4) Admitted.

5) Denied.

6) Admitted.

7) Admitted except as to word "debt," which is denied.

8) Admitted.

9) Denied.

10) Admitted.

11) Admitted.

12) Paragraph 12 cannot be admitted or denied because the defendants are not in possession of sufficient facts and cannot reasonably obtain such facts upon reasonable inquiry which would enable the defendants to admit or deny such request; moreover said request is objected to on the grounds that such requested admission is wholly immaterial and irrelevant to the pending adtion.

13) Admitted.

14) Admitted.

RESPECTFULLY SUBMITTED,

DIRECTOR, OFFICE OF ADULT PROBATION

DIVISION OF CRIMINAL JUSTICE

DEFENDANTS

By /s/ Carl Schuman
CARL SCHUMAN
Assistant State's Attorney
Appellate Unit
Office of the Chief State's Attorney

* * *

(Certification omitted in printing.)

UNITED STATES BANKRUPTCY COURT

DISTRICT OF CONNECTICUT

In Re: CAROLYN ROBINSON, DEBTOR,	
	Case No. 5-81-114
	Adv. No. 5-84-0063
CAROLYN ROBINSON, PLAINTIFF,	
vs.	
DIRECTOR, DEPARTMENT OF ADULT PROBATION, ET ALS., DEFENDANTS.	April 27, 1984

COMMISSIONERS, DEPARTMENTS OF INCOME MAINTENANCE AND ADMINISTRATIVE SERVICES RESPONSE TO REQUEST FOR ADMISSION

The defendants respond to the request for admissions as follows:

1. Paragraph 1, admitted.

2. Paragraph 2, denied as to first sentence. Admitted as to the second sentence.

3. Paragraph 3, admitted.

4. Paragraph 4, admitted.

5. Paragraph 5, denied.

6. Paragraph 6, admitted.

7. Paragraph 7, admitted except as to word "debt," which is denied.

8. Paragraph 8, admitted.

9. Paragraph 9, denied.

10. Paragraph 10, admitted.

11. Paragraph 11, admitted.

12. Paragraph 12 cannot be admitted or denied because the defendants are not in possession of sufficient facts and cannot reasonably obtain such facts upon reasonable inquiry which would enable the defendants to admit or deny such request; moreover said request is objected to on the grounds that such requested admission is wholly immaterial and irrelevant to the pending action.

13. Paragraph 13, admitted.

14. Paragraph 14, admitted.

THE COMMISSIONERS, DEPARTMENT OF INCOME MAINTENANCE and ADMINISTRATIVE SERVICES

BY THEIR ATTORNEY
JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

By: /s/ Edward F. Reynolds, Jr.

EDWARD F. REYNOLDS, JR.
ASSISTANT ATTORNEY GENERAL

90 Brainard Road
Hartford, CT. 06114
Telephone: 566-7014

* * *

(Certification omitted in printing.)

IN THE
UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF CONNECTICUT

IN RE: CAROLYN ROBINSON, Debtor	
CAROLYN ROBINSON, Plaintiff	
V.	CASE NO. 5-81-114
DIRECTOR, DEPARTMENT OF ADULT PROBATION; and DIRECTOR, DIVISION OF CRIMINAL JUSTICE OF THE JUDICIAL DEPARTMENT; Defendants	

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff requests this Court to issue preliminary injunction restraining defendant Director of the Department of Adult Probation and his staff from taking any steps to request or enforce payment, revoke probation, or report a violation of probation herein, pending a determination of the dischargeability issues herein.

For cause, plaintiff alleges that:

1. Since being served with process in *in re Pellegrino*, Case No. 5-83-361, Adv. No. 5-83-554, defendant Director of the Department of Adult Probation has issued an order which has resulted in plaintiff, who is not paying her restitution

debts because of her bankruptcy discharge, being told that the Department had determined that her debt is not dischargeable, and that payments must be made under penalties of arrest or revocation of probation.

2. By reason of the specific provisions of 22 U.S.C. sec. 523(a)(4) and (7), and sec. 523(c), there is reasonable likelihood that plaintiff may prevail herein.

3. Defendant will merely be delayed in receiving payment if the Department's position is correct.

4. If the Department's position is incorrect, the plaintiff may suffer distress, expense, imprisonment, and similar hardships to herself and her family if the injunction herein is not granted.

WHEREFORE, plaintiff requests relief.

THE PLAINTIFF

BY: /s/ Francis X. Dineen

JOANNE S. FAULKNER
FRANCIS X. DINEEN
HER ATTORNEYS
399 Temple Street
New Haven, CT 06511
777-4811

ORDER

Motion for Preliminary Injunction is Denied. Dated at Bridgeport, this 3rd day of April, 1984.

/s/ Alan H.W. Shiff

Alan H.W. Shiff, Bankruptcy Judge

STATE OF CONNECTICUT
SUPERIOR COURT

NOTICE TO APPEAR AND COMPLAINT– VIOLATION OF PROBATION OR CONDITIONAL DISCHARGE
JD-AP-46 New 4-82
Gen. Stat. 53a-32, Pr. Bk. 943

DOCKET NO. IS CR-6-185844

* * *

(Instructions omitted in printing.)

NAME AND ADDRESS OF DEFENDANT: Carolyn Robinson, 635 Fitch St., Hamden, CT

* * *

(NOTICE TO DEFENDANT omitted in printing.)

COMPLAINT:

The undersigned officer complains and alleges to the above-named court that on or about: 5-4-81 to 4-1-84 at Hamden, Connecticut the above-named defendant did violate the terms and conditions of his/her probation/conditional discharge in violation of General Statute 53a-30 in that:

On 11/14/80, the offender was sentenced in Superior Court, G.A.6, New Haven, for the crime of Larceny 2nd by Fraud, 2 counts and did receive a sentence of NLT 1 year NMT 3 years execution suspended and 5 years probation. Special Condition: "Restitution in the amount of $9,932.00 at the rate of $100.00 per month commencing 1/16/81." As of 4/1/84, Ms. Robinson had paid $450.00. The balance was $9,482.95. Last payment was 5/4/81. Carolyn Robinson was making restitution on a regular basis and was in satisfactory status.

Ms. Robinson filed bankruptcy with the United States Bankruptsy [sic] Court and on 5/14/81, was discharged as a debtor. Since that time, Ms. Robinson had made no further payment.

In March of 1984, Ms. Robinson did receive a letter from the Office of Adult Probation informing Ms. Robinson that the policy of this office as indicated by the Director of the Judicial Department Office of Adult Probation is as follows: "The Office of Adult Probation will adopt a position that the condition of probation concerning restitution is valid and not dischargeable. Ms. Robinson was also informed at that time that an arrearage of $3,450.00 was due.

On April 2, 1984, the offender did report to the Office of Adult Probation with payment in the amount of $100.00. It should be noted that the offender has abided by all agency imposed conditions of probation excluding the special condition and that the offender has remained in satisfactory status throughout the duration of the probation. To date, the offender has paid $550.00 and at this point, an arrearage of $3,350.00 remains. It is suggested that an appropriate schedule be arranged on a monthly basis in order to pay this amount by 11/14/85 which is the date that this probationary period expires.

To date, the total balance due at this point is $9,382.95.

Dated at Hamden on 4/12/84. /s/ Vincent J. Benevento

Vincent J. Benevento
Sr. Probation Officer

NOTICE:

You, the above-named defendant, are hereby notified to appear before the Superior Court at:

New Haven Superior Court, G.A. 6
121 Elm St., New Haven, CT

Court Appearance Date and Time: 4-27-84, 10:00 A.M.

then and there to answer to the charge of Violation of Probation/Conditional Discharge.

Dated at New Haven on April 13, 1984

Signed

[signature illegible]

Judge of the Superior Court

* * *

(FOR COURT USE ONLY omitted in printing.)

CERTIFICATION OF PERSONAL SERVICE:

I hereby certify that I served the foregoing notice to appear and complaint by personally delivering a copy to the above-named defendant:

On 4-16-84 at 12:00 P.M.

Signed: Vincent J. Benevento
Senior Probation Officer

NO. CR6-185844

STATE OF CONNECTICUT : SUPERIOR COURT

V. : G.A. #6, AT NEW HAVEN

CAROLYN ROBINSON : APRIL 25, 1984

MOTION FOR STAY

The defendant, Carolyn Robinson, moves for a stay of proceedings in this Court with regard to the complaint of Violation of Probation filed against her, and in support of her motion she represents the following:

1. On February 5, 1981, the defendant, Carolyn Robinson, filed her Chapter 7 petition for relief in bankruptcy in the U.S. Bankruptcy Court for the District of Connecticut, Case No. 5-81-114, and was granted an order for relief pursuant to 11 U.S.C. §§ 301 and 362.

2. Duly scheduled in her petition and schedules was her debt to the State of Connecticut Department of Income Maintenance, and the Office of Adult Probation. Notice was sent by the U.S. Bankruptcy Court to each of these entities on February 20, 1981.

3. Prior to the last date for filing a complaint to determine dischargeability of a debt, pursuant to 11 U.S.C. § 523(c), no such complaint was filed.

4. The defendant received her Discharge in Bankruptcy on May 14, 1981.

5. The defendant's debt to the State of Connecticut Department of Income Maintenance, and the Office of Adult Probation, was discharged by her Discharge in Bankruptcy. Pursuant to 11 U.S.C. § 524, the Discharge voids any judgment at any time obtained, to the extent that such judgment

is a determination of the personal liability of the debtor with respect to any debt discharged under 11 U.S.C. § 727, and further operates as an injunction against the continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor.

6. The defendant has already filed and served a Complaint to Determine Dischargeability of Debt in order to obtain a judicial determination that the restitution debt, involved in this instant Superior Court probation complaint, was discharged in defendant's bankruptcy. Said complaint is pending before the U.S. Bankruptcy Court, Adversary No. 205-5-84-0063, and a trial date has been set for May 18, 1984. The State of Connecticut is a party in said action in the Bankruptcy Court, and the defendant is seeking both declaratory and injunctive relief therein.

7. In view of the fact that the issues presently being litigated in the U.S. Bankruptcy Court will be determinative of all or some of the issues involved in this instant Superior Court probation complaint, the defendant is requesting that this instant matter be stayed until there is a final decision, including a final decision on any appeals that may be taken by either party, rendered on the defendant's Complaint pending in the Bankruptcy Court.

8. The defendant recognizes that, pursuant to Conn. Gen. Stat. § 53a-31(b), the period of her sentence of probation is interrupted from the date of the issuance of the Notice to Appear (April 16, 1984) through the entire period of the stay until a final determination as to the alleged violation of probation has been made by this Court.

THE DEFENDANT, CAROLYN ROBINSON

BY: _____

FRANCIS X. DINEEN
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399 Temple Street
New Haven, CT 06511
777-4811

ORDER

The foregoing motion having been duly presented to this Court, it is hereby

ORDERED: that the proceedings in this Complaint of Violation of Probation be and hereby are stayed pending the final determination, including the final determination of any appeals that may be taken by any party, of the defendant's Complaint, Adv. No. 205-5-84-0063, presently pending in the U.S. Bankruptcy Court. Pursuant to Conn. Gen. Stat. § 53a-31(b), the period of the defendant's sentence of probation is interrupted during the period of this stay of proceedings until a final determination of the alleged violation of probation has been made by this Court.

Sherman Drutman, J.

JUDGE OF THE SUPERIOR COURT

* * *

(Certification omitted in printing.)

Supreme Court, U.S.
FILED
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(6)

No. 85-1033

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

JOHN J. KELLY,
CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL.,
Petitioners,

v.

CAROLYN ROBINSON,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE PETITIONERS

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QUESTION PRESENTED

IS A CRIMINAL RESTITUTION ORDER DISCHARGEABLE AS A DEBT IN BANKRUPTCY?

LIST OF ALL PARTIES

In addition to petitioner John J. Kelly, Connecticut Chief State's Attorney, the other petitioners are: Director, Officer of Adult Probation; Commissioner, Department of Income Maintenance; and Commissioner, Department of Administrative Services. The sole respondent is Carolyn Robinson.

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No. 85-1033

In The

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OCTOBER TERM, 1985

JOHN J. KELLY, CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL.,
Petitioners,

v.

CAROLYN ROBINSON,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Bankruptcy Court for the District of Connecticut, which was adopted by the United States District Court for the District of Connecticut, is reported at 45 B.R. 423 (Bankr. D. Conn. 1984), and is reprinted in Appendix A to the Petition, pages 1A–6A. The bankruptcy and district courts relied heavily on the opinion in

In re Pellegrino, which is reported at 42 B.R. 129 (Bankr. D. Conn. 1984), and is reprinted in Appendix B to the Petition, pages 7A–27A. The opinion of the United States Court of Appeals for the Second Circuit is reported at 776 F.2d 30 (2d Cir. 1985), and is reprinted in Appendix C to the Petition, pages 28A–54A. This Court's grant of certiorari is reported at 106 S.Ct. 1181 (1986).

JURISDICTION

The United States Court of Appeals for the Second Circuit rendered its decision on October 29, 1985. No petitions for rehearing or requests for an extension of time within which to file a petition for certiorari were filed. The petition for certiorari was filed on December 13, 1985 and granted by this Court on February 24, 1986. This Court has jurisdiction to review by writ of certiorari the judgment of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case primarily involves the following statutes: 11 U.S.C. § 101(4), (11), concerning the definition of "claim" and "debt," 11 U.S.C. § 105, concerning the injunctive powers of the bankruptcy court, 11 U.S.C. § 362, concerning the automatic stay, 11 U.S.C. § 523, concerning exceptions to discharge, and 11 U.S.C. § 727(b), concerning the effect of discharge. These statutes are set out verbatim at pages v–xxi of the Petition. (Pet.) The petitioners also will refer to 11 U.S.C. § 524(a), concerning the effect of discharge, 11 U.S.C. § 525, concerning the prohibition of discrimination against bankrupts, 11 U.S.C. § 35a (repealed 1979) of the 1898 Bankruptcy Act, concerning the nondischargeability of certain civil obligations, 11 U.S.C. § 93j (repealed 1979), concerning proof and allowance of claims, 11 U.S.C. § 103a (repealed 1979), concerning provability of debts, and Conn. Gen. Stat.

§§ 53a-30–33, concerning the probation system in Connecticut. These statutes are set out in the Appendix to this Brief (App. to Br.). Other statutes of lesser import are cited in the argument. Citations are to the most recent version of the statute unless otherwise noted.

STATEMENT OF THE CASE

This case raises the question of whether a federal bankruptcy court has any authority to nullify a valid final judgment of a state criminal court and thus allow a convicted criminal, sentenced to make restitution, to escape justice by the simple expedient of listing the restitution order as a dischargeable debt on her bankruptcy petition.

The facts are not in dispute.[1] On July 28, 1980, the respondent, Carolyn Robinson, pleaded guilty in Connecticut Superior Court to the crime of larceny in the second degree. *See* Conn. Gen. Stat. § 53a-123 (1979). The conviction arose out of Robinson's wrongful receipt of $9,932.95 in public assistance benefits from the petitioner Connecticut Department of Income Maintenance (CDIM) while simultaneously receiving Social Security benefits. On November 14, 1980, a state superior court judge sentenced Robinson to a prison term of not less than one year nor more than three years, execution of which was suspended, and to probation for five years on the condition that she make restitution to the State of Connecticut in the amount of $9,932.95 at the rate of $100.00 per month, commencing January 16, 1981. A payment at that rate commencing at that time meant that the total amount that Robinson would have to restore over the five year probationary period amounted to $5,800.00.

On February 5, 1981, Robinson filed a voluntary petition for bankruptcy under Chapter 7 in the United States Bankruptcy Court for the District of Connecticut. *See* 11 U.S.C. § 701 et seq. The petition contained a schedule of creditors that listed, among others, CDIM as having a claim of $6,000 for public assistance and the petitioner Connecticut

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[1] Except where otherwise noted, the following statement of facts derives from the statement of facts contained in the Second Circuit and bankruptcy court opinions. *See* Appendix to Petition (App. to Pet.) at 3A–4A, 30A–33A.

Office of Adult Probation (COAP) as having a claim of $9,932.95 for restitution. On February 20, 1981, the bankruptcy court notified both CDIM and COAP of Robinson's Chapter 7 petition, but neither agency filed any form of objection to discharge by the April 27, 1981 deadline for doing so. On May 14, 1981, the bankruptcy court issued an order discharging Robinson from all dischargeable debts, declaring null and void all existing or future judgments that purported to hold Robinson personally liable with respect to any such dischargeable debts, and enjoining all creditors whose debts were thereby discharged from thereafter endeavoring to collect such debts.

Up until May 4, 1981, Robinson had made restitution payments totaling $450. After receiving her bankruptcy discharge on May 14, 1981, Robinson notified COAP of her intent to discontinue making payments and did in fact cease making them.

The petitioner state agencies took no action until February, 1984, when COAP wrote Robinson a letter requesting that she resume payment. At about the same time Robinson filed an adversary proceeding in United States Bankruptcy Court for the District of Connecticut, naming as defendants the Commissioner of CDIM, the Commissioner of the Connecticut Department of Administrative Services, the Director of COAP, and the Connecticut Chief State's Attorney. Robinson sought a declaration that the May 14, 1981 discharge order had discharged her restitution obligations to COAP and CDIM, an injunction prohibiting the named state officials from taking any steps to obtain further restitution payments, a finding that the state officials were in contempt of court, and an award of attorney's fees under 42 U.S.C. § 1988.

On March 19, 1984, COAP wrote Robinson a second letter requesting a $100 payment by April 1, 1984. J.A. at 23A. Approximately one week later Robinson filed a motion in a bankruptcy court for a preliminary injunction against state restitution enforcement efforts. J.A. at 41A. On April 2, 1984, Robinson nevertheless made an additional $100

payment, bringing her total restitution payments to $550. J.A. at 44A. On the next day, the bankruptcy court denied the motion for a preliminary injunction. J.A. at 42A. The state, on April 16, 1984, thereupon served Robinson with a Notice to Appear for Violation of Probation premised on her failure to pay the accumulated arrearage. J.A. at 43A. With the agreement of the state, Robinson then obtained in state superior court a stay of the probation violation proceedings pending final disposition of the federal lawsuit. J.A. at 46A.

Following a brief trial on the merits later in 1984, the bankruptcy court entered a Memorandum and Proposed Order denying all relief that Robinson sought. Relying on its decision in the companion case of *In re Pellegrino*, 42 B.R. 129 (Bankr. D. Conn. 1984), the bankruptcy court concluded that a criminal restitution order does not constitute a bankruptcy "debt" within the meaning of 11 U.S.C. § 101(11) and that, even if it does, such a debt is a "penalty" and thus exempt from discharge under 11 U.S.C. § 523(a)(7). The district court adopted the proposed order and judgment entered for the state officials.

Upon appeal by Robinson, the United States Court of Appeals for the Second Circuit reversed. The court's opinion observed that a majority of the courts considering the issue have held that a criminal restitution obligation is not a debt under the Bankruptcy Code and that only one decision, *In re Brown*, 39 B.R. 820 (Bankr. M.D. Tenn. 1984), had held to the contrary. App. to Pet. at 35A–36A, 38A. In adopting what was thus a minority rule, the Second Circuit relied on the fact that Congress had intended a broad meaning for the word "debt," that the Code defined debt as a "right to payment," and that restitution created a right to payment since COAP had a right to receive and enforce payment of the restitution obligation. App. to Pet. at 34A–43A, 45A–47A. The court explained that the Code's legislative history revealing Congress to have stated that "[t]he bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension," referred primarily to the

exemption of criminal actions from the automatic stay, *see* 11 U.S.C. § 362(b)(1), not to the definition of "debt." App. to Pet. at 43A–45A. The court added that the existence of the automatic stay exemption and of a specific exemption from discharge for fines and penalties, *see* 11 U.S.C. § 523(a)(7), demonstrated that "Congress drew such lines as it thought appropriate to grant or deny criminals the benefits of the bankruptcy laws," and that the majority line of cases had simply "impermissibly reordered the priorities established by Congress." App. to Pet. at 44A–45A. The court sought to distinguish four federal court of appeals cases that held or suggested that restitution is nondischargeable on the ground that in those cases the restitution obligation arose or would have arisen after bankruptcy and thus could not have constituted a "debt" under 11 U.S.C. § 727(b). App. to Pet. at 41A–43A. Finally, the court determined that the exemption from discharge in 11 U.S.C. § 523(a)(7) for a "penalty . . . payable to and for the benefit of a governmental unit . . . [that] is not compensation for actual pecuniary loss" did not apply. Ap. to Pet. at 37A–42A. The court reasoned that the phrase "not compensation for actual pecuniary loss" referred to obligations that where wholly non-compensatory and excluded those that were partly compensatory. App. to Pet. at 41A. Thus the court could find that even though restitution represented a "penalty . . . payable to and for the benefit of a governmental unit," it did not fit within the § 523(a)(7) exemption from discharge because it was at least partly compensatory in nature. App. to Pet. at 41A–42A.

Judge Mansfield concurred in a separate opinion. App. at 53A–54A. He wrote that the court had reached an accurate but "unfortunate result." According to Judge Mansfield, the effect of the court's decision in many instances would be to "stultify and render useless criminal restitution payments as a means of punishing persons convicted of felonies." Judge Mansfield expressed his fear that "[t]he convicted criminal will simply use bankruptcy to escape the obligation to make criminal restitution payments ordered by the court." In closing, Judge Mansfield urged Congress to remedy 'this

unfortunate loophole" by amending 11 U.S.C. § 523(a)(7) to make criminal restitution payments non-dischargeable in bankruptcy.

Apparently because of the importance of the question presented[2] and the apparent conflict among the circuits,[3] this Court granted certiorari.

---

[2] This case represents a sequel to *Ohio v. Kovacs*, 105 S. Ct. 705 (1985), which held that the monetary costs of a state-obtained injunction requiring a debtor to clean up a hazardous waste site constituted a debt in bankruptcy. The resolution of the issue in this case will have a significant impact on the ability of federal and state governments to fashion punishment that meets the crime. *See* Brief of Amicus Curiae States; Brief of National Governors' Association, et al., as amici curiae in Support of Petitioners.

[3] The Fifth, Seventh, and Ninth Circuits have held that a prior bankruptcy discharge of a debt created by the debtor's criminal fraud does not prevent a federal criminal court from later ordering the defendant to make restitution to the fraud victim in the amount of the loss. *United States v. Carson*, 669 F.2d 216, 217 (5th Cir. 1982); *United States v. Alexander*, 743 F.2d 472, 474, 480 (7th Cir. 1984); *United States v. Roberts*, 783 F.2d 767 (9th Cir. 1985). The Third, Fifth and Eleventh Circuits have all held that absent extraordinary circumstances a federal court should not enjoin a state criminal proceeding that might result in a restitution order requiring the defendant to pay back a discharged debt, *In re Davis*, 691 F.2d 176 (3d Cir. 1982), or a debt that may be discharged at the conclusion of pending bankruptcy proceedings. *McDonald v. Burrows*, 731 F.2d 294, 297-99 (5th Cir.), *cert. denied*, 105 S. Ct. 173 (1984); *Barnette v. Evans*, 673 F.2d 1250 (11th Cir. 1982). The Second Circuit attempted to distinguish these decisions on the ground that the restitution orders there represented nondischargeable post-petition debts under 11 U.S.C. § 727(b); Pet. at xviii, whereas in the present case the restitution obligation arose well before bankruptcy. These other Courts of Appeals, however, did not limit their decisions to post-petition restitution and instead suggested that Congress never intended to permit the discharge of any criminal restitution, whenever imposed. *See, e.g. United States v. Alexander*, 743 F.2d at 480 ("The bankruptcy proceeding is largely unconcerned with criminality"); *Barnette v. Evans*, 673 F.2d at 1251 ("The purpose of bankruptcy is to protect those in financial, not moral, difficulty").

SUMMARY OF ARGUMENT

I.A. Criminal restitution is not a debt within the meaning of the Bankruptcy Code. The Code defines "debt" as a liability on a claim and a "claim" as a right to payment. Criminal restitution does not confer a right to payment on the crime victim, who has no right to enforce the restitution order. Nor does it give a right to payment to the court or probation system, since they have no right to retain or assign the restitution payments. Criminal restitution is part of the punishment for a crime, not a mere monetary obligation to a creditor.

B. By the time of the passage of the Code in 1978, the courts had carved from the concept of bankruptcy debts an exception for criminal sanctions. Since Congress in 1978 did not specifically alter this exception, this Court must presume that it sought to maintain it. Indeed, the only salient expression of Congress in the legislative history of the Code was its statement that "the bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension."

C. The opposite conclusion, that criminal restitution is a bankruptcy debt, would contravene fundamental notions of public policy. It would mean that a federal court could nullify enforcement of a valid final judgment of a state court in violation of the principles of federalism articulated in *Younger v. Harris*, 401 U.S. 37 (1971). And it would create the absurd result that a person could commit a criminal act that benefits the criminal or damages others financially and at the same time leaves the state without any viable means to make the criminal pay back his gain or repair the damage.

II. Alternatively, even assuming criminal restitution is a debt, it is excepted from discharge by 11 U.S.C. § 523(a)(7). This provision makes nondischargeable "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit [that is] not compensation for actual pecuniary loss." The Court of Appeals agreed that restitution is a "penalty . . .

payable to and for the benefit of a governmental unit." And although restitution has compensatory consequences, it in essence is "not compensation for actual pecuniary loss." This point is especially true when one construes this phrase in light of the policy underlying the Code against the creation of a means whereby a criminal can escape punishment.

ARGUMENT

A CRIMINAL RESTITUTION ORDER IS NOT DISCHARGEABLE AS A DEBT IN BANKRUPTCY

I. A CRIMINAL RESTITUTION ORDER IS NOT A "DEBT"

The concept of criminal restitution has a history "older than the English legal tradition as a whole." *United States v. Florence*, 741 F.2d 1066, 1067 (8th Cir. 1984). As a condition of probation in Connecticut and elsewhere, *see* Conn. Gen. Stat. § 53a-30(a)(4); 18 U.S.C. § 3651, 43 Stat. 1259–60 (1925); 18 U.S.C. A. § 3563(b)(3) (1985), restitution constitutes "an authorized mode of mild and ambulatory punishment . . . intended as a reforming discipline." *Korematsu v. United States*, 319 U.S. 432, 435 (1943). Restitution, moreover, "undoubtedly serves traditional purposes of punishment" because the obligation to restore a crime victim's property "vindicat[es] society's interest in peaceful retribution." *United States v. Brown*, 744 F.2d 905, 909 (2d Cir.), *cert. denied*, 105 S. Ct. 599 (1984). "While recompense to the victim is a laudable consequence of restitution, the focus of any probation regime is on the offender." *United States v. Carson*, 669 F.2d at 217. *Accord* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 932, 937 (1984); Brief of Amicus Curiae States, part I.

A. Statutory Considerations

The principal question in this case is whether restitution constitutes a "debt" within the meaning of the Bankruptcy Code. This question arises because § 727(b) of the Code discharges a qualified debtor "from all *debts*," subject to the exceptions to discharge enumerated in 11 U.S.C. § 523 and discussed later in this brief. 11 U.S.C. § 727(b); Pet. at xviii

(emphasis added). Section 524(a)(1), moreover, voids any judgment that represents a determination of the personal liability of the debtor "with respect to a *debt* discharged under section 727." 11 U.S.C. § 524(a)(1); App. to Br. at 1A (emphasis added). Finally, § 524(a)(2) operates as an injunction against the commencement or continuation of an action "to collect, recover or offset any such *debt* as a personal liability of the debtor." 11 U.S.C. § 524(a)(2) (emphasis added); App. to Br. at 1A.

When, as here, the resolution of a federal question turns on the meaning of a statute and the intention of Congress, this Court looks first to the statutory language and then to the legislative history if the statutory language is unclear. *Blum v. Stenson*, 465 U.S. 886, 896–97 (1984). The task of a federal court is "to interpret the words of . . . statutes in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979). "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternate interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

The Bankruptcy Code defines "debt" as a "liability on a claim," 11 U.S.C. § 101(11), and a "claim," in pertinent part, as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal equitable, secured, or unsecured." 11 U.S.C. § 101(4)(A); Pet. at v. Criminal restitution does not qualify as a "debt" or "claim" since neither the crime victim nor the state court system has such a "right to payment."[4]

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[4] The Code also defines a "claim" as a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(4)(B); Pet. at v–vi. As discussed later, it was under this definition that this Court found a claim and debt to exist in *Ohio v. Kovacs*, 105 S. Ct. at 708. The respondent in this case has never asserted that restitution gives rise to this sort of claim and the court below did not address the matter.

1. The Court of Appeals essentially agreed that a crime victim has no "right to payment" of restitution, referring to the prevailing view of the bankruptcy courts to that effect and discussing only whether COAP has such a right. App. to Pet. at 36A–37A, 46A–48A. *See also In re Pellegrino*, 42 B.R. 129, 132–33 (Bankr. D. Conn. 1984); App. to Pet. at 13A–14A. This view is unquestionably correct. In Connecticut, as elsewhere, a crime victim has no right to determine the restitutionary amount, no absolute right even to testify at a restitution hearing, no right to appeal a restitution determination he deems inadequate, and no right to enforce payment. *See In re Pellegrino*, 42 B.R. at 132; App. to Pet. at 12a; Conn. Gen. Stat. § 53a-30(a)(4) (providing that "the amount [of restitution] and the manner of performance" shall be fixed by "the court"); App. to Br. at 6A. *Accord United States v. Brown*, 744 F.2d at 910 (applying federal law); *In re Johnson*, 32 B.R. 614, 616 (Bankr. D. Colo. 1982) (applying Colorado law). A crime victim is a beneficiary of restitution, but he has no legal right to obtain it.

2. Nor does the state court or probation system in imposing or collecting restitution hold a "claim" or "right to payment." Under Connecticut law, a sentencing court may suspend a prison sentence, impose probation, and order as a condition of probation the payment of restitution "in an amount [the defendant] can afford to pay or provide in a suitable manner, for the loss or damage caused thereby." Conn. Gen. Stat. §§ 53a-29, 53a-30(a)(4); App. to Br. at 6A. Criminal defendants ordered to make restitution send their payments to COAP, which is an agency within the judicial department, Conn. Gen. Stat. § 54-103a, and COAP, in turn, sends these payments to the crime victim. App. to Pet. at 12A, 51A. COAP officers monitor compliance with the restitutionary order and may apply to the sentencing court for an arrest warrant or notice to appear, or may make a warrantless arrest, in the event of a suspected violation of probation. Conn. Gen. Stat. § 53a-32(a); App. to Br. at 7A. If after a hearing the state establishes a violation of probation, the court may modify or

enlarge the conditions of probation or it may revoke probation and order the defendant incarcerated for any length of time up to the term of the suspended sentence. Conn. Gen. Stat. § 53a-32(b); App. to Br. at 8A.

These facts alone, wholly apart from the other factors discussed below, make it apparent that the conclusion of the Court of Appeals that COAP has a "claim" and "right to payment" strains these terms too far. The same is true if one expands the inquiry to include the sentencing court. While the sentencing court can set the amount of restitution and ultimately modify or revoke probation for nonpayment, and COAP can receive payments in the first instance, neither the court nor COAP can retain these payments. Neither can assign the obligation. And neither judicial agency stands in the shoes of the ordinary creditor. As explained, the purpose of restitution is not to compensate the victim, and certainly not to compensate the court system, but rather to impose a form of punishment on the offender. *United States v. Carson, supra;* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis, supra.* The immediate genesis of a restitution obligation is not the creation of monetary indebtedness but rather the adjudication of criminal guilt beyond a reasonable doubt. *United States v. Brown,* 744 F.2d at 909. When the government orders restitution it acts not as a creditor but in the "separate realm of the administration of the criminal laws." *134 Baker Street, Inc. v. Georgia,* 47 B.R. 379, 381 n.1 (N.D. Ga. 1984).

This conclusion does not differ when, as here, the victim is a governmental agency and thus when the state, in a collective sense, retains the restitutionary payments. For purposes of determining the bankruptcy status of restitution this Court must consider the victim governmental agency as a separate entity from the state court system, as has the bankruptcy court in Connecticut. *In re Pellegrino,* 42 B.R. at 134; App. to Pet. at 16A. Any other approach would prove anomalous. It would mean that restitution might not qualify as a dischargeable debt when the debtor steals from a

a private victim, because the state has no right to retain the payments, but that restitution might become a dischargeable debt when a person steals from the state and must make restitution payments retained by an arm of the government. In terms of their ability to enforce restitution, the victims of a crime against the government—ultimately the people—cannot have fewer rights than does a private victim. While the state is not a true "creditor" in any restitution case, the resolution of the issue certainly cannot turn on whether a state agency other than the court system retains the restitution payments.

3. The position that criminal restitution is not a "debt" that creates a "right to payment" squares fully with and in fact derives support from this Court's recent decision in *Ohio v. Kovacs*, 105 S. Ct. 705 (1985). *Kovacs* held that the monetary costs of a state-obtained injunction requiring a debtor to clean up a hazardous waste site represented a bankruptcy debt. Although the issue in *Kovacs* was whether Ohio had a claim within § 101(4)(B), which refers to a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment," and not, as here, whether the state had a simple "right to payment" under § 101(4)(A), a "right to payment" is literally a component of a § 101(4)(B) claim and this Court specifically held that the debtor's obligation to Ohio gave rise to such a right. 105 S. Ct. at 708–11; Pet. at v–vi. Nevertheless, the difference between *Kovacs* and the appeal at bar is clear. It is no less than the difference between a civil case and a criminal case. This Court has frequently emphasized "society's compelling interest in finding, convicting, and punishing those who violate the law," *Moran v. Burbine*, 106 S. Ct. 1135, 1144 (1986), and the " 'legitimate and compelling state interest' in protecting the community from crime." *Schall v. Martin*, 104 S. Ct. 2403, 2410 (1984). In a variety of contexts this Court or Members thereof have adverted to the primacy of the criminal law. *See Younger v. Harris*, 401 U.S. 37, 55 n.2 (Stewart, J., concurring) ("A state's decision to classify conduct as criminal provides some

indication of the importance it has ascribed to prompt and unencumbered enforcement of the law"); *In re Johnson*, 167 U.S. 120, 126 (1897) ("The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest"). Indeed, the *Kovacs* Court attempted to make clear that its holding did not extend to criminal cases:

> It is well to emphasize what we have not decided. First, we do not suggest that Kovacs' discharge will shield him from prosecution for having violated the environmental laws of Ohio or for criminal contempt for not performing his obligations under the injunction prior to bankruptcy. Second, had a fine or monetary penalty for violation of state law been imposed on Kovacs prior to bankruptcy, § 523(a)(7) forecloses any suggestion that his obligation to pay the fine or penalty would be discharged in bankruptcy.

105 S. Ct. at 711. Although this language extends literally only to fines and penalties and implicitly treats them as nondischargeable debts under § 523(a)(7) rather than as nondebts under § 101(11), it nonetheless plainly indicates this Court's view of the Bankruptcy Code as having minimal application to criminal judgments. *Kovacs* thus provides considerable support for the conclusion that criminal restitution is not a bankruptcy debt. *See also* Brief of National Governors' Association, et al., as amici curiae in Support of Petitioners, part II.A.

4. The respondent will no doubt point to the language of § 523(a)(7) providing for an exception to discharge "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit" and argue that the Code refers to fines and penalties, and thus implicitly restitution, as "debts." This argument is resourceful but

ultimately unpersuasive. In the first place it appears from an examination of the remainder of § 523(a)(7), *see* Petition at xv, and the pertinent discussion of the Senate Judiciary Committee Report on the then-proposed Bankruptcy Code, both of which discuss only tax-related matters, that Congress in enacting § 523(a)(7) intended to address the status of civil tax penalties, not criminal sanctions.[5] Second, the exception stated in subsection (a)(7), like only two other exceptions to discharge among the nine enumerated in § 523(a), uses the language "to the extent such debt is for . . . . " *See also* 11 U.S.C. §§ 523(a)(5)(A), 523(a)(9); Pet. at xiv, xvi. It thus leaves entirely open whether a penalty such as criminal restitution is to any extent a debt.

In this respect subsection (a)(7) resembles its predecessor, § 57j of the 1898 Bankruptcy Act. 11 U.S.C. § 93j (repealed 1979); App. to Br. at 4A. *See In re Cox*, 33 B.R. 657, 658 (Bankr. M.D. Ga. 1983). Section 57j provided that:

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[5] The Senate Report provides:

> Paragraph (7) makes nondischargeable certain liabilities for penalties including tax penalties if the underlying tax with respect to which the penalty was imposed is also nondischargeable (sec. 523(a)(7)). These latter liabilities cover those which, [sic] but are penal in nature, as distinct from so-called "pecuniary loss" penalties which, in the case of taxes, involve basically the collection of a tax under the label of a "penalty." This provision differs from the bill as introduced, which did not link the nondischarge of a tax penalty with the treatment of the underlying tax. The amended provision reflects the existing position of the Internal Revenue Code [Title 26] (Rev. Rul. 68-574, 1968-2 C.B. 595).

S. Rep. No. 989, 95th Cong. 2d Sess. 79 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5865. Although the paragraph seems to be missing a line, the Report clearly reveals the Senate Judiciary Committee's intention that § 523(a)(7) address the dischargeability of civil tax penalties such as those authorized in 26 U.S.C. § 6651 et seq. Thus construed, § 523(a)(7) focuses on an issue that had generated much litigation and uncertainty under the 1898 Bankruptcy Act. *See* 3 *Collier on Bankruptcy* ¶ 57.22[2], [2.1] (14th ed. 1977).

> Debts owing to the United States or to any State or any subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued on the amount of such loss according to law.

Although the language of § 57j suggests that penalties owing to the United States or to any State were "debts," many courts interpreting the 1898 Act had held or stated that criminal fines and penalties were in fact not debts. *See Zwick v. Freeman*, 373 F.2d 110, 116 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *Parker v. United States*, 153 F.2d 66, 71 (1st Cir. 1946); *In re Abramson*, 210 F. 878, 880 (2d Cir. 1914); *In re Moore*, 111 F. 145, 149–50 (W.D. Ky. 1901); *People v. Washburn*, 97 Cal. App. 3d 621, 158 Cal. Rptr. 822, 824–25 (1979); *People v. Mosesson*, 78 Misc. 2d 217, 356 N.Y.S.2d 483, 484–85 (Sup. Ct. 1974). Thus both § 57j and § 523(a)(7) concern those fines or penalties that qualify as "debts," but neither has purported to determine what fines or penalties fit within that category. As this Court has stated, "a section of statute should not be read in isolation from the context of the whole Act and . . . in interpreting legislation [this Court] 'must not be guided by a single sentence or member of a sentence but [should] look to the provisions of the whole law, and to its object and policy.' " *Richards v. United States*, 369 U.S. 1, 11 (1962) (quoting *United States v. Boisdoré's Heirs*, 49 U.S. (8 How.) 113, 122 (1850)). Congress defined "debt" in § 101(11). Section 523(a)(7) is not a provision defining "debt" but rather one creating an exception to discharge. Any argument that § 523(a)(7) reveals the intent of Congress to resolve the question of whether criminal restitution is a bankruptcy debt is one that wrenches § 523 out of context and overlooks other considerations found in the Code and its purposes. *Richards v. United States, supra.*

5. It is true, as the Court of Appeals emphasized, that Congress intended to create the broadest possible definition of the terms "debt" and "claim." App. to Pet. at 37A–39A, 42A. But this Court "interpret[s] the words of . . . statutes in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Organization, supra.* This Court long ago stated that the purpose of the bankruptcy laws is to "convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the *honest* debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon *business misfortunes.*" *Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554–55 (1915) (emphasis added). "The various provisions of the Bankruptcy Act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act." *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934). It is thus fully appropriate to interpret the term "debt" as broadly as possible to relieve the honest debtor from his misfortunes. At the same time it would be highly inappropriate and destructive of Congressional purposes to construe the term "debt" to allow a criminal to escape punishment.

B. Historical Considerations

The normal rule of statutory construction is that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755, 759–60 (1986). By the time of the passage of the Bankruptcy Code in 1978, the courts had made clear that criminal sanctions with monetary consequences did not represent bankruptcy debts. The absence of any evidence that Congress in 1978 intended to change this prevailing view thus indicates that Congress in fact had no intent to change it.

1. As early as 1846 this Court, in *Spalding v. New York ex rel. Backus*, 45 U.S. (4 How.) 21 (1846), summarily affirmed a decision of a New York state court that had held that a fine for criminal contempt was not a debt within the bankruptcy law. Other courts, with near unanimity, later followed suit. A federal district court ruled in 1901 that a fine for a substantive criminal offense did not constitute a debt, reasoning that "[t]he provisions of the bankrupt act have reference alone to civil liabilities, as demands between debtor and creditors, as such, and not to punishment inflicted pro bono publico for crimes committed." *In re Moore*, 111 F. 145, 150 (W.D. Ky. 1901). *Contra In re Alderson*, 98 F. 588 (D. W. Va. 1899). *See also* 11 U.S.C. § 1(14), 30 Stat. 544 (1898) (repealed 1979) (defining "debt" under the 1898 Act as "any debt, demand, or claim provable in bankruptcy.") In a 1914 case holding that a civil penalty for violation of a state agriculture law did not create a provable bankruptcy debt the Second Circuit observed that "bankrupts who have violated laws passed for the public good cannot escape punishment by going into bankruptcy." *In re Abramson*, 210 F. 878, 880 (2d Cir. 1914). Citing *Spalding*, the First Circuit noted in 1946 that, while a fine for civil contempt might qualify as a debt, a fine for criminal contempt would not: "It was not in the contemplation of Congress that the federal bankruptcy power should be employed to pardon a bankrupt from the consequences of a criminal offense, whether the criminal contempt be against the authority of a state or federal court." *Parker v. United States*, 153 F.2d 66, 71, 72–73 (1st Cir. 1946). And as recently as 1967 in a case in which a debtor claimed that nonmonetary agricultural sanctions imposed by the federal government violated the Bankruptcy Act the Second Circuit remarked that "governmental sanctions are not regarded as debts even when they require monetary payments" and cited the First Circuit and district court precedents to that effect. *Zwick v. Freeman*, 373 F.2d 110, 116 (2d. Cir.), *cert. denied*, 389 U.S. 835 (1967). This body of case law prompted the following conclusion in the 1975 edition of Collier on Bankruptcy: "It is almost generally accepted that the liability for a fine or penalty is not dischargeable, if for no other reason than the imperative

necessity of enforcing criminal sanctions enacted for the public welfare." 3A Collier on Bankruptcy ¶ 63.12 (14th ed. 1975). (footnote omitted).[6]

Restitution cases decided under the Bankruptcy Act of 1898 proved no exception to this trend. A New York state court, relying on the principle that "[a] bankruptcy proceeding is civil in nature and is intended to relieve an honest and

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[6] Although this passage refers to criminal sanctions as not dischargeable and does not precisely refer to them as nondebts, the 1898 Bankruptcy Act contained no specific exception to discharge for fines and penalties, *see* 11 U.S.C. § 35a (Bankruptcy Act § 17a) (repealed 1979); App. to Br. at 3A, and thus the passage in Collier at a minimum suggests that the courts had devised ways to exempt criminal fines and penalties from bankruptcy notwithstanding the absence of any clear language in the Act authorizing them to do so. In 1984 Collier put the matter in these terms:

> The Bankruptcy Act made no specific provision concerning the dischargeability of fines and penalties due to a governmental unit, but certain principles became well settled in this respect. Fines for violation of law, and forfeiture were not provable and therefore held to be not dischargeable. Generally, fines and penalties were not affected by discharge.

3 Collier on Bankruptcy ¶ 523.17 (15th ed. 1984) (footnotes omitted).

As mentioned earlier, § 57j of the Act provided for the disallowance of debts owing to the United States or any state for a penalty or forfeiture. 11 U.S.C. § 93j (repealed 1979); App. to Br. at 4A. The concept of allowance under the Act referred to acceptance of the claim by the courts. The courts, however, could only allow what were called "provable" debts. A provable debt, as defined in § 63a of the Act, 11 U.S.C. § 103a (repealed 1979); App. to Br. at 4A, was one that, among other things, represented a fixed liability evidenced by a judgment or instrument in writing. Since the courts could only allow or disallow a claim if the creditor had first proved it, the reference in § 57j to the disallowance of penalties and forfeitures was not a provision making these obligations nondischargeable but rather one that served only to disallow those limited types of penalties, such as tax penalties, that could be proved in the first place. 3 Collier on Bankruptcy ¶¶ 57.02, 57.22 (14th ed. 1977). In fact, disallowed but provable debts were discharged pursuant to 11 U.S.C. § 35a (Bankruptcy Act § 17a) (repealed 1979); App. to Br. at 3A. As Collier points out in the paragraph just quoted, however, "[f]ines for violation of law, and forfeiture were not provable and therefore held not to be dischargeable."

unfortunate debtor of debts and to permit him to begin his financial life anew," concluded that "[a] discharge has no effect whatsoever upon a condition of restitution in a criminal sentence." *People v. Mosesson*, 78 Misc. 2d 217, 356 N.Y.S.2d 483, 484–85 (Sup. Ct. 1974). A second New York court cited this language favorably in a case in which the debtor sought an injunction against a pending criminal prosecution. *People ex rel. Auerbach v. Topping Bros.*, 79 Misc. 2d 260, 359 N.Y.S.2d 985, 987–88 (Crim. Ct. 1974). Relying in part on these New York precedents, a California appellate court similarly ruled that "[a] condition of restitution in a sentence of probation is a part of the judgment of conviction. It does not create a debt nor a debtor/creditor relationship between the persons making and receiving restitution." *People v. Washburn*, 97 Cal. App. 3d 621, 158 Cal. Rptr. 822, 825 (1979).

2. With the exception of this last California case, which came down on October 11, 1979, eleven days after the new Code took effect, *see Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53 n.1 (1982), Congress in enacting the Bankruptcy Code was presumptively familiar with the conclusion of these cases that criminal sanctions were not bankruptcy debts. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). "It is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon v. University of Chicago*, 441 U.S. 677, 696–97 (1979).[7]

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[7] Congress was also obviously aware that federal law had authorized restitution as a condition of probation since 1925. *See United States v. Brown*, 744 F.2d at 911 (citing 43 Stat. 1259, 1260 (1925) (codified as revised at 18 U.S.C. § 3651)).

Congress in considering and passing the Bankruptcy Code of 1978 did absolutely nothing to upset the settled view of the courts that criminal sanctions were not debts. Congress had very different purposes in mind. The major purpose of the bill was "the modernization of the bankruptcy laws." H.R. Rep. No. 595, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5965. Substantively the new Code sought to deal with the widespread adoption of the Uniform Commercial Code in the 1960's, the vast spread of commercial credit, and the lack of uniformity in the law concerning business reorganizations. H.R. Rep. No. 595, 95th Cong. 2d Sess. 3–5, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5965–66. Procedurally the Code served to replace a strained and somewhat unregulated bankruptcy referee system with the creation of federal bankruptcy courts and federal bankruptcy judges. *Id.; see also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. at 52–56. Nothing in the materials discussing the passage of the Code in 1978 even remotely suggests that Congress sought to tamper with the prevailing rule of the courts that criminal sanctions with monetary consequences did not constitute bankruptcy debts. *Cf. Bryan v. Itasca County*, 426 U.S. 373, 380–81 (1976) ("provision for state criminal jurisdiction over offenses committed by or against Indians on the reservations was the central focus of Pub. L. 280 . . . . In marked contrast in the legislative history is the virtual absence of expression of congressional policy or intent respecting § 4's grant of civil jurisdiction to the states").

3. Not only did Congress register no dissatisfaction with the judicially created criminal law exception to the definition of debt, but it affirmatively expressed its approval of the underlying policy that had spawned this exception. The House Report on the 1978 bill makes clear the position of Congress that "[t]he bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial overextension. Thus, criminal actions and proceedings may proceed in spite of bankruptcy." H.R. Rep. No. 595, 95th Cong., 2d Sess. 342, *reprinted in* 1978 U.S. Code Cong. & Ad. News

6299. It is true, of course, as the Court of Appeals emphasized, that this statement appears not in the legislative history of the Code sections defining "debt" and "claim" but rather in the explanation of the 11 U.S.C. § 362(b)(1) exception to the automatic stay for "the commencement or continuation of a criminal action or proceeding against the debtor." 11 U.S.C. § 362(b)(1); Pet. at ix; App. to Pet. at 44A–46A. But the Court of Appeals erred in concluding that this statement provides no indication of an intention to exclude obligations arising out of criminal activities from the term "debt." App. to Pet. at 44A. First, the fact that there exists an express criminal law exception to and accompanying legislative history regarding the automatic stay in no way undermines the inference of a similar exception to the definition of "debt," since the judicially created criminal law exception to "debt" had become firmly established by 1978 whereas "in enacting § 362 in 1978, Congress significantly broadened the scope of the automatic stay . . . [and] it was necessary for Congress to limit this new power expressly." *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. at 761. Second, one cannot reasonably assume that Congress intended to exempt criminal proceedings from the automatic stay and at the same time provide for the partial invalidation of criminal proceedings by discharge of a restitution order. No useful purpose would be served by allowing the continuation of a criminal prosecution only to nullify in part its result. Moreover, discharge of a criminal restitution order—an order imposed after a court has found a person guilty of a crime beyond a reasonable doubt—has little to do with the goal of providing distressed debtors "relief from financial over-extension." In short, the statement of Congress that the bankruptcy laws are not "a haven for criminal offenders" expressed a general

principle applicable to the bankruptcy scheme and fully supports an interpretation interpretation of "debt" that would exclude criminal monetary obligations.[8]

Congress thus acted in 1978 in full view of a judicially created criminal law exception to the concept of bankruptcy debts. If Congress had desired to change this rule of law, "it [would have] ma[d]e[ ] that intent specific." *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. at 759–60. It did not do so. The only available expression in the legislative history suggests the unwillingness of Congress to extend the relief available under the Bankruptcy Code to persons subject to criminal sanctions.

C. Public Policy Considerations

1. This Court should always strive to interpret an Act of Congress in accordance with general public policy. *See Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. at 762 (construing the Bankruptcy Code in conformance with "repeated congressional emphasis on its 'goal of protecting the environment against toxic pollution' "). Contrary to this approach, the decision below, insofar as it holds that a state criminal restitution order is a bankruptcy debt, conflicts frontally with the general doctrine in public policy, enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), that federal courts, including

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[8] Criminal obligations are apparently not the only implied exception to the term "debt." As part of his remarks upon introduction of the Senate amendment to the bankruptcy reform act proposed by the House, Senator DeConcini observed that the term "debt" does not include a policy loan made by an insurance company. To have made an express exception to the term "debt" for such loans, according to Senator DeConcini, "would have required elaboration of other legal relationships not arising by a liability on a claim." 124 Cong. Rec. 33992 (statement of Sen. DeConcini), *reprinted in* 1978 U.S. Code Cong. & Ad. News 6507. Senator DeConcini did not specify any of the "other legal relationships," but his statement clearly suggests that several exist.

bankruptcy courts, should not interfere with pending criminal prosecutions in the states. *See Barnette v. Evans*, 673 F.2d at 1251-52. As the *Younger* court stated, "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, [should] always endeavor[ ] to do so in ways that will not unduly interfere with the legitimate activities of the States." 401 U.S. at 44. The interpretation given the Bankruptcy Code by the Court of Appeals dramatically compromises the objectives of the *Younger* doctrine by allowing a federal bankruptcy court to nullify the enforcement of a valid final judgment of a state criminal court. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 599 (1975) (applying *Younger* to attempts to enjoin enforcement of state civil nuisance judgment). One cannot easily imagine that this result furthers "the purposes Congress sought to serve," *Chapman v. Houston Welfare Rights Organization, supra*, or that it reflects, in the words of the Court of Appeals, the "priorities established by Congress" in enacting the bankruptcy laws.

The respondent argued in opposition to certiorari that *Younger* principles do not apply in this case because the Connecticut Superior Court ordered a stay of probation revocation proceedings during the pendency of this federal litigation. Br. in Opp. at 14-15. The fact that the parties and the state court chose to defer to federal resolution of the issue presented in this case, however, hardly eliminates the concerns underlying *Younger*. On the contrary, the stay issued by the state court serves to highlight the direct confrontation between two independent judicial systems that might otherwise have arisen.

Were this Court to rule that restitution is dischargeable in bankruptcy, then in every subsequent case in which a person ordered to make restitution in state court petitioned for bankruptcy, a federal court would have to assume the role of enjoining state court enforcement of state criminal law. Such a situation represents precisely the type of undue "interfere[nce] with the legitimate activities of the States" that

Younger condemned. Thus *Younger* principles remain fully applicable here and they should inform this Court's interpretation of the Bankruptcy Code.[9]

2. The construction of the Code by the Court of Appeals also produces decidedly absurd results, as the concurring opinion essentially acknowledged. The ruling below allows Robinson to steal from the government and pay off her creditors with the money she stole. The court's decision allows for the growth of a revolving door system of justice whereby a defendant convicted of a crime in state criminal court can merely walk across the street to federal bankruptcy court and escape justice.

This Court should not presume that Congress intended such an absurd result. *Griffin v. Oceanic Contractors, Inc., supra.* Congress specifically provided for the exception from discharge of certain taxes, fraudulently-created debts, alimony and child support payments, debts arising from willful injury, tax fines and penalties, student loans, and debts incurred as a result of drunk driving. 11 U.S.C. § 523(a); Pet. at x–xvii. While Congress apparently characterized these obligations as debts not subject to discharge rather than obligations not

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[9] The *Younger* doctrine does not, of course, leave a debtor helpless in the occasional case in which the animus of the state prosecution is "neither punishment nor a sense of public duty, but rather [a desire] to obtain payment of a dischargeable debt either by an order of restitution or by compromise of the criminal charge upon payment of the civil obligation." *In re Taylor,* 16 B.R. 323, 326 (Bankr. D. Md. 1981). In such a case the debtor can normally challenge the bona fides of the prosecution in state court, as the Third and Eleventh Circuits have explained. *In re Davis,* 691 F.2d at 178; *Barnette v. Evans,* 673 F.2d at 1252. But if state remedies are ineffective or it is evident that the state prosecution is brought in bad faith or for purposes of harassment, *In re Davis,* 691 F.2d at 178, then a bankruptcy court can and should assume jurisdiction pursuant to 11 U.S.C. § 105(a) and enjoin the participants in the state prosecution. *Id.* at 177 & n.5; *In re Wise,* 25 B.R. 440, 441–42 (Bankr. E.D. Va. 1972); Pet. at vi. In the case at bar, the state court imposed restitution well before the petition in bankruptcy and Robinson has never suggested that the state did not bring its criminal prosecution against her in good faith.

qualifying as debts, these obligations, unlike criminal sanctions, were expressly made nondischargeable debts by § 17a of the 1898 Bankruptcy Act and did not carry with them at the time of the drafting of the Code in 1978 a history of treatment by the courts as nondebts. 11 U.S.C. § 35a (repealed 1979). App. to Br. at 3A. Thus it was logical for Congress to continue this approach by excluding these civil obligations from bankruptcy by way of the exceptions to discharge in 11 U.S.C. § 523 while at the same time excluding criminal sanctions from bankruptcy by leaving untouched their historic status as nondebts. It would have reflected little logic, however, for Congress to have exempted such civil obligations as child support from bankruptcy while allowing a bankrupt to discharge criminal restitution.

The respondent's answer is that the state need only file a timely objection to discharge pursuant to § 523(a). which the state did not do in this case. This proposal cannot possibly comport with the Congressional design for exempting criminal sanctions from discharge. As a general matter, when a state court has already adjudicated an individual guilty of a crime beyond a reasonable doubt, state prosecutors should not then have to shoulder the added burden of learning the intricacies of bankruptcy law, filing a complaint in federal court, paying filing fees, participating in discovery, engaging in motion practice, and, in some instances, proving their case over again, simply to ensure that a convicted criminal does not escape the punishment that the criminal court imposed. *See* Bankruptcy Rules 4004(d), 4005, 7001 et seq. As this Court stated in discussing the rule of prosecutorial damages immunity: "if the prosecutor could be made to answer in court each time . . . a person charged him with wrong-doing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976).

The fact that the debtor will have pleaded guilty or that a jury will have found the debtor guilty of an offense beyond a reasonable doubt will not necessarily lessen the

prosecution's burden in bankruptcy court of proving the state's claim to restitution. Even assuming that the criminal court's finding of guilt will have res judicata effect in bankruptcy court, the description of the crime in the state court judgment—e.g. forgery or issuing a bad check, *see* Conn. Gen. Stat. §§ 53a-128, 53a-138—may not precisely match the phraseology of the Bankruptcy Code's exceptions to discharge—e.g. "fraud" or "larceny," *see* 11 U.S.C. § 523(a)(4)—thus requiring the prosecution to present at least some additional proof that the state restitution order arises from a debt excepted from discharge by the Code. More significantly, perhaps, with respect to the amount of restitution, the state will undoubtedly have to prove its case from the start. A sentencing court in imposing restitution is not bound by the amount of the defendant's gain charged in the indictment or found by the jury but instead may order restitution in an amount that, based on its discretion and the usually flexible procedures applicable at sentencing, reflects the victim's loss and otherwise satisfies the government's interest in deterrence, retribution, and rehabilitation. *See, e.g., United States v. Lemire*, 720 F.2d 1327, 1352-53 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 2678 (1984); *State v. Gunther*, 39 Conn. Supp. 504, 466 A.2d 804, 808 (App. Sess. 1983). *See generally United States v. Grayson*, 438 U.S. 41, 49 (1978); *Williams v. New York*, 337 U.S. 241 (1949). In Connecticut and elsewhere a sentencing court, especially as part of a plea bargain, may also base a sentence on reliable information concerning charges that the government has dropped or not prevailed upon. *See United States v. Davies*, 683 F.2d 1052 (7th Cir. 1982); *State v. Huey*, 199 Conn. 121, 126-27, ____A.2d____ (1986). These sentencing determinations will not have res judicata effect. *United States v. Brown*, 744 F.2d at 910. Hence in all these cases the same prosecutor who obtained a conviction in criminal court, either by plea or by trial, may then have to prove the government's entitlement to the full amount of restitution in a second or at least more formal trial in bankruptcy court. Depending on when bankruptcy proceedings commenced, this second trial might take place several years after the criminal proceedings, thus exacerbating the

prosecutor's burden of proof and conflicting with the strong policy favoring finality of criminal judgments. *See Engle v. Isaac*, 456 U.S. 107, 127 (1982). The true irony is that while the double jeopardy clause normally prohibits a second criminal trial after judgment, *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), the respondent's proposal would in effect require one.

The respondent's proposal, moreover, even if workable in some cases, would merely narrow the existing loophole without eliminating it. Although an exception to discharge exists for debts created by "fraud . . . embezzlement, or larceny," 11 U.S.C. § 523(a)(4), and "willful and malicious injury by the debtor to another entity or to the property of another entity," *id.* § 523(a)(6), no exception exists that would prevent the discharge of restitution in cases involving common state crimes such as reckless manslaughter, Conn. Gen. Stat. § 53a-56(a)(1), criminally negligent homicide, *id.* § 53a-58, reckless assault with a deadly weapon, *id.* § 53a-60(a)(3), negligent assault with a deadly weapon, *id.* § 53a-61(a)(3), reckless burning, *id.* § 53a-114, bribery, *id.* § 53a-147, receiving kickbacks, *id.* § 53a-161c, cruelty to animals, *id.* § 53-247, or professional gambling, *id.* § 53-278b. *See, e.g.*, S. Rep. 989, 95th Cong., 2nd Sess. 79, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5865 (exception to discharge for debts created by "willful or malicious" conversion or injury does not encompass acts done in "reckless disregard" of consequences).[10]

The respondent may reply, as she did in opposition to certiorari, that the existence of gaps and crevices in her proposal means merely that in those instances the policies established by Congress in the Bankruptcy Code prevail over the interests of the criminal justice system. Br. in Opp. at 13–14. According

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[10] The respondent's proposal assumes not only that restitution is a debt, but also that restitution, when imposed, for example, in a larceny case, is a "debt . . . for . . . larceny" within the terms of § 523(a)(4) rather than a separate obligation that supersedes the original larceny debt to the victim. *See In re Brown*, 39 B.R. at 823 (leaving this question open).

to the respondent, then, the fact that a state has no recourse to prevent the discharge of, for example, a $100,000 criminal restitution order imposed as a result of a criminal's reckless burning is just the price society must pay for the existence of the bankruptcy laws.

The State of Connecticut takes a different view. We believe that criminals, not society, should pay for crime. Surely Congress in enacting the Bankruptcy Code did not disagree. Undoubtedly it recognized "society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine, supra.* Thus the wholly inadequate scheme devised by the respondent for enforcing restitution orders jeopardized by bankruptcy cannot possibly reflect "the priorities established by Congress." The construction of the Code most consistent with its language, its history, and with public policy is that restitution is not a debt.

II. ALTERNATIVELY, EVEN IF A CRIMINAL RESTITUTION ORDER IS A DEBT, IT IS EXCEPTED FROM DISCHARGE BY § 523(a)(7)

Section 523(a)(7) of the Code provides an exception to discharge "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." Unlike the exceptions to discharge for debts arising from false pretenses, larceny, or willful injury to person or property, § 523(a)(7) contains no time limits on its effectiveness. 11 U.S.C. § 523(c); Pet. at xviii.

The Court of Appeals held that, although restitution is a "penalty" and in this case was "payable to and for the benefit of a governmental unit," restitution was at least partly compensatory and thus did not satisfy the subparagraph (a)(7) requirement that the penalty "not [be] compensation for actual pecuniary loss." The court focused on the fact that a Connecticut court can order an offender to make restitution in

an amount "he can afford to pay or provide in a suitable manner, *for the loss or damage caused thereby*," Conn. Gen. Stat. § 53a-30(a)(4); App. to Br. at 6A (emphasis in court's opinion), and that the restitution order here of $9,932.95 equaled the precise amount of the loss. App. to Pet. at 48A–53A.

The petitioners believe that this analysis does not accurately characterize the nature of criminal restitution, either in this case or in general, and that it does not interpret the Code in accordance with the intent of Congress. Thus even if this Court should find that criminal restitution constitutes a debt, it should also find that it falls within the § 523(a)(7) exception to discharge.[11]

1. The restitution order in this case was unusual in that, while the state court nominally ordered restitution in the amount of the $9,932.95 loss to the state, the total payments Robinson would have had to make at the rate of $100.00 per month through the end of her probationary period would have amounted only to $5,800.00. Thus under no circumstances would the state have received full compensation for its loss. In any event, even in a case in which the restitutionary amount more clearly matched the pecuniary loss, the conclusion that restitution represents compensation would not follow. The equation of the restitutionary amount with the pecuniary loss means only that the punishment fits the crime. Certainly it would make little sense for a sentencing court to order restitution in an amount wholly unrelated to the magnitude of the

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[11] Whether restitution in a case involving a private victim is "payable to and for the benefit of a governmental unit" is a question not before the Court. It does not appear, however, that the position advanced above would necessarily lead to the result that restitution is nondischargeable in cases involving a governmental victim but dischargeable in cases involving a private victim. The Code defines "governmental unit" to include not only a "department, agency, or instrumentality of the United States [or] a State," but also the "United States" and the "State" itself. 11 U.S.C. § 101(21). Restitution even in a private victim case is "payable to and for the benefit of a governmental unit" because the probationer initially makes payments to the state, App. to Pet. at 12A, and because restitution in all cases "vindicat[es] society's interest in peaceful retribution." *United States v. Brown*, 744 F.2d at 909.

victim's loss. If restitution is to "vindicat[e] society's interest in peaceful retribution," *United States v. Brown*, 744 F.2d at 909, then the restitution order will necessarily bear a reasonable relationship to the amount of the loss.

2. Moreover, restitution, whether equal to the amount of the loss or not, is "not compensation for actual pecuniary loss" within the meaning of § 523(a)(7). While compensation may represent a consequence of restitution, it is not truly its purpose. *United States v. Carson, supra.* "Although restitution may appear to share with the civil law the aim of compensation, close examination reveals that its principal goal is not its ability to make the victims whole, but rather its utility as a corrective device." Note, *Victim Restitution in the Criminal Process: A Procedural Analysis, supra.* Restitution in this sense resembles liability for the costs of prosecution, which several lower federal courts, apparently without disagreement, have held excepted from discharge under § 523(a)(7) despite the superficially compensatory character that costs may possess. *In re Zarzynski*, 771 F.2d 304 (7th Cir. 1985); *In re Cox*, 33 B.R. 657 (Bankr. M.D. Ga. 1983).

The resolution of whether § 523(a)(7) can include restitution within its exception to discharge must, of course, take into account the available aids to construction of the Code. Thus this Court must read § 523(a)(7) in view of the fact that Congress in enacting the bankruptcy laws sought primarily to "relieve the honest debtor from the weight of oppressive indebtedness," *Williams v. United States Fidelity & Guaranty Co., supra*, that it had no intention of creating "a haven for criminal offenders," H.R. Rep. No. 595, *supra*, that a federal court discharge of a state criminal restitution order would constitute undue federal interference in the administration of criminal justice in the states, *Younger v. Harris, supra*, and that the discharge of criminal restitution would create the absurd result in this case and many others that a state cannot make a criminal pay for her crime in the most meaningful manner. *Chapman v. Houston Welfare Rights Organization, supra.* Viewing the matter in this light, this Court can and, if it

reaches the issue, should interpret § 523(a)(7) to prevent the discharge of a sentence of criminal restitution.[12]

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[12] Significant doubt exists as to whether the state could revoke Robinson's probation if this Court found restitution to represent a dischargeable debt. Section 525 of the Code makes it illegal for a governmental unit to "deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to . . . a person . . . solely because such bankrupt . . . has not paid a debt that is dischargeable." 11 U.S.C. § 525(a); App. to Br. at 2A. This section codifies the result in *Perez v. Campbell*, 402 U.S. 637 (1971), which held that a state cannot refuse to renew a driver's license solely because the driver had not paid a tort judgment discharged in bankruptcy. Moreover, "[t]he section is not exhaustive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination." S. Rep. No. 989, 95th Cong., 2d Sess. 81, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5867. *Cf. Beardon v. Georgia*, 461 U.S. 660 (1983) (prohibiting a state from revoking probation solely because of probationer's bona fide inability to pay fine or restitution unless no other method will satisfy the state's penological interests).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted.

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In The
Supreme Court Of The United States

OCTOBER TERM, 1985

JOHN J. KELLY,
CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL.,
Petitioners,

v.

CAROLYN ROBINSON,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX TO BRIEF OF PETITIONERS
(Containing Statutes Involved in addition to those reprinted in the Appendix to the Petition)

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STATUTES INVOLVED
(in addition to those reprinted in the Appendix to the Petition)

11 U.S.C. § 524. Effect of discharge

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the injunction against the commencement or continuation of an action, the employment of process, or an act to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523 or 1328(c)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

11 U.S.C. § 525. Protection against discriminatory treatment

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a-499s), the Packers and Stockyards Act, 1921 (7 U.S.C. 181-229), and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943 (57 Stat. 422; 7 U.S.C. 204), a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(b) No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt—

(1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;

(2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. § 35a. (Bankruptcy Act § 17a) (repealed 1979). Dischargeability of Debts—Debts Not Affected by Discharge

a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part except such as (1) are taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankruptcy. *Provided, however,* That a discharge in bankruptcy shall not release a bankrupt from any taxes (a) which were not assessed in any case in which the bankrupt failed to make a return required by law, (b) which were assessed within one year preceding bankruptcy in any case in which the bankrupt failed to make a return required by law, (c) which were not reported on a return made by the bankrupt and which were not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt, (d) with respect to which the bankrupt made a false or fraudulent return, or willfully attempted in any manner to evade or defeat, or (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State or political subdivision thereof, but has not paid over; but a discharge shall not be a bar to any remedies available under applicable law to the United States or to any State or any subdivision thereof, against the exemption of the bankrupt allowed by law and duly set apart to him under this Act: *And provided further,* That a discharge in bankruptcy shall not release or affect any tax lien; (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings

in bankruptcy; (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; (5) are for wages and commissions to the extent that they are entitled to priority under subdivision a of section 64 of this Act; (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment; (7) are for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female or for breach of promise of marriage accompanied by seduction, or for criminal conversation; or (8) are liabilities for willful and malicious injuries to the person or property of another other than conversion as excepted under clause (2) of this subdivision.

11 U.S.C. § 93j (Bankruptcy Act § 57j) (repealed 1979)
Proof and Allowance of Claims

j. Debts owing to the United States or to any State or any subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interests as may have accrued on the amount of such loss according to law.

11 U.S.C. § 103a (Bankruptcy Act § 63a) (repealed 1979)
Debts Which May Be Proved

a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) costs taxable against a

bankrupt who was at the time of the filing of the petition by or against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) an open account, or a contract express or implied; (5) provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments; (6) an award of an industrial-accident commission, body, or officer of any State having jurisdiction to make awards of workmen's compensation in case of injury or death from injury, if such injury occurred prior to adjudication; (7) the right to recover damages in any action for negligence instituted prior to and pending at the time of the filing of the petition in bankruptcy; (8) contingent debts and contingent contractual liabilities; or (9) claims for anticipatory breach of contracts, executory in whole or in part, including unexpired leases of real or personal property: *Provided, however,* That the claim of a landlord for damages for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after bankruptcy, plus an amount equal to the unpaid rent accrued, without acceleration, up to such date: *And provided further,* That in the case of an assignment of any such claim for damages, the court shall, in determining the amount thereof, examine the circumstances of the assignment and the consideration paid or to be paid therefor, and may allow the claim of the assignee in such amount, subject to the provisions of the foregoing proviso of this clause (9), as will be fair and equitable.

Conn. Gen. Stat. Sec. 53a-30. Conditions of probation and conditional discharge. (a) When imposing sentence of probation or conditional discharge, the court may, as a condition of the sentence, order that the defendant: (1) Work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment; (2) undergo medical or psychiatric treatment and remain in a specified institution, when required for that purpose; (3) support his dependents and meet other family obligations; (4) make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of performance; (5) if a minor, (A) reside with his parents or in a suitable foster home, (B) attend school, and (C) contribute to his own support in any home or foster home; (6) post a bond or other security for the performance of any or all conditions imposed; (7) refrain from violating any criminal law in the United States, this state or any other state; (8) reside in a residential community center or halfway house approved by the commissioner of correction, and contribute to the cost incident to such residence; (9) satisfy any other conditions reasonably related to his rehabilitation. The court shall cause a copy of any such order to be delivered to the defendant and to the probation officer, if any.

(b) When a defendant has been sentenced to a period of probation, the office of adult probation may require that the defendant comply with any or all conditions which the court could have imposed under subsection (a) which are not inconsistent with any condition actually imposed by the court.

(c) At any time during the period of probation or conditional release, after hearing and for good cause shown, the court may modify or enlarge the conditions, whether originally imposed by the court under this section or otherwise, and may extend the period provided the original period with any extensions shall not exceed the periods authorized by section 53a-29. The court shall cause a copy of any such order to be delivered to the defendant and to the probation officer, if any.

Conn. Gen. Stat. Sec. 53a-31. Calculation of periods of probation and conditional discharge. Interruption of period of sentence. Sentence of imprisonment may satisfy sentence of probation or conditional discharge. (a) A period of probation or conditional discharge commences on the day it is imposed, except that, where it is preceded by a sentence of imprisonment with execution suspended after a period of imprisonment set by the court, it commences on the day the defendant is released from such imprisonment. Multiple periods, whether imposed at the same or different times, shall run concurrently.

(b) Issuance of a warrant or notice to appear for violation pursuant to section 53a-32, shall interrupt the period of the sentence as of the date of such issuance until a final determination as to the violation has been made by the court.

(c) In any case where a person who is under a sentence of probation or of conditional discharge is also under an indeterminate sentence of imprisonment, or a sentence authorized under section 18-73 or 18-75, imposed for some other offense by a court of this state, the service of the sentence of imprisonment shall satisfy the sentence of probation or of conditional discharge unless the sentence of probation or of conditional discharge is revoked prior to parole or satisfaction of the sentence of imprisonment.

Conn. Gen. Stat. Sec. 53a-32. Violation of probation or conditional discharge: Arrest; procedure. (a) At any time during the period of probation or conditional discharge, the court or any judge thereof may issue a warrant for the arrest of a defendant for violation of any of the conditions of probation or conditional discharge, or may issue a notice to appear to answer to a charge of such violation, which notice shall be personally served upon the defendant. Any such warrant shall authorize all officers named therein to return the defendant to the custody of the court or to any suitable detention facility designated by the court. Any probation officer may arrest

any defendant on probation without a warrant or may deputize any other officer with power to arrest to do so by giving him a written statement setting forth that the defendant has, in the judgment of the probation officer, violated the conditions of his probation. Such written statement, delivered with the defendant by the arresting officer to the official in charge of any correctional center or other place of detention, shall be sufficient warrant for the detention of the defendant. After making such an arrest, such probation officer shall present to the detaining authorities a similar statement of the circumstances of violation. Provisions regarding release on bail of persons charged with a crime shall be applicable to any defendant arrested under the provisions of this section. Upon such arrest and detention, the probation officer shall immediately so notify the court or any judge thereof. Thereupon, or upon an arrest by warrant as herein provided, the court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation charges. At such hearing the defendant shall be informed of the manner in which he is alleged to have violated the conditions of his probation or conditional discharge, shall be advised by the court that he has the right to retain counsel and, if indigent, shall be entitled to the services of the public defender, and shall have the right to cross-examine witnesses and to present evidence in his own behalf.

(b) If such violation is established, the court may continue or revoke the sentence of probation or conditional release or modify or enlarge the conditions, and, if such sentence is revoked, require the defendant to serve the sentence imposed or impose any lesser sentence. No such revocation shall be ordered, except upon consideration of the whole record and unless such violation is established by reliable and probative evidence.

Conn. Gen. Stat. Sec. 53a-33. Termination. The court or sentencing judge may at any time during the period of probation or conditional discharge, after hearing and for good cause shown, terminate probation or conditional discharge.

Supreme Court, U.S.
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No. 85-1033

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October Term, 1985

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**ON WRIT OF CERTIORARI
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BRIEF OF THE RESPONDENT

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QUESTION PRESENTED

Was the United States Court of Appeals for the Second Circuit correct in ruling that the respondent's criminal restitution obligation was discharged in her bankruptcy, under the specific factual circumstances of this case, wherein the state and its agencies, after receiving notice, failed to file a complaint to determine nondischargeability of the obligation under Code § 523(c)?

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CONSTITUTIONAL PROVISION INVOLVED

Article VI, Clause Two, provides:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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STATEMENT OF THE CASE

This case raises the question of whether in a bankrupty proceeding, in which actual notice has been given, the failure by the state and its agencies to file any complaint in the bankruptcy court, pursuant to the requirements of 11 USC § 523(c), requesting a determination of the nondischargeability of a criminal restitution obligation based upon a larcency, will thereby result in that restitution obligation being discharged in bankruptcy.

As stated by the Second Circuit, the material facts in this case are not in dispute.[1] In 1980, the respondent, Carolyn Robinson, was convicted in the Connecticut Superior Court of larcency in the 2nd degree as a result of having wrongfully received $9,932.95 in public assistance

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[1] The following statement of underlying facts is taken in large part from the statement of facts contained in the Second Circuit opinion in the section therein entitled, "Background". See Appendix to Petition (App. to Pet.) at 31A-34A. Appropriate references are made for facts not included in the "Background" section of the Second Circuit's opinion.

benefits from the Connecticut Department of Income Maintenance (CDIM) while at the same time receiving Social Security benefits. On November 14, 1980, she was sentenced to not less than one year nor more than three years in prison, execution suspended and placed on probation for five years. A special condition of her probation, as ordered by the Superior Court, was that she make restitution in the amount of $9,932.95 to be paid at the rate of $100 per month commencing January 16, 1981. J.A. at 21A. Payments were to be made to the Connecticut Office of Adult Probation (COAP). Mrs. Robinson complied with this order through May 4, 1981, and made payments totaling $450.

On February 5, 1981, Mrs. Robinson filed a petition in bankruptcy, under chapter 7, in the U.S. Bankruptcy Court for the District of Connecticut. In her Schedule A-3, she listed among her creditors the State of Connecticut, CDIM, as having a claim for public assistance and the State of Connecticut, COAP, as having a claim for $9,932.95 for restitution. Record, Doc. No. 3. In due course, on February 20, 1981, the bankruptcy court gave notice to both COAP and CDIM that Mrs. Robinson had filed a Chapter 7 bankruptcy petition and that they were listed therein. COAP and CDIM were informed by this notice that April 27, 1981 was the last day for the filing of objections to discharge and for the filing of complaints to determine the dischargeability of any debt pursuant to 11 USC § 523(c).

Although they were each given a total of 66 days to file, together with the opportunity to request additional time under Bankruptcy Rule 4007(c), neither COAP nor CDIM filed any objection to discharge or any complaint to determine the dischargeability of its claim.

On May 14, 1981, the bankruptcy court granted Mrs. Robinson her Discharge in bankruptcy, thereby discharging her from all her dischargeable debts. The Discharge order entered by the court recited than any existing or future judgment obtained in any court other than the bankruptcy court was null and void as a determination of the personal liability of the debtor with respect to any dischargeable debt, and the order enjoined all creditors from commencing, continuing or employing any action or process to collect or recover any such dischargeable debt. J.A. at 13A-14A.

Shortly thereafter, on May 20, 1981, Mrs. Robinson's attorney wrote to COAP stating that Mrs. Robinson's discharge in bankruptcy had discharged the state's restitution order and that Mrs. Robinson no longer had any liability to make further payments to COAP. The letter cited various statutory provisions to support this position, and further stated that in view of this Mrs. Robinson was now being advised by her attorney not to make further payments under the restitution order. The letter concluded with the request to COAP that "If you disagree with the above, please let me know immediately". J.A. at 19A. COAP did not respond to this letter, and Mrs. Robinson stopped making restitution payments at that time.

Nearly three years later, in February 1984, COAP wrote Mrs. Robinson a letter informing her that it considered her restitution order valid and not dischargeable in her bankruptcy and that it intended to enforce the restitution order to the fullest extent possible. The letter requested Mrs. Robinson to resume her monthly payments of $100. The letter acknowledged receipt of Mrs. Robinson's prior payments, totaling $450, and stated that the balance owing was now $9,482.95. J.A. at 21A-22A.

Shortly thereafter, Mrs. Robinson commenced her adversary proceeding in the bankruptcy court against COAP and CDIM seeking a judgment declaring that her Discharge in bankruptcy had discharged her restitution obligation to COAP and CDIM, enjoining the defendants from pursuing their efforts to obtain additional restitution payments, and awarding damages and attorney's fees. By its letter of March 19, 1984, COAP continued in its efforts to collect restitution payments, and requested a $100 payment from Mrs. Robinson by April 1, 1984. J.A. at 23A. In response, Mrs. Robinson made a $100 payment to COAP on April 2, 1984. J.A. at 44A. Mrs. Robinson also moved for preliminary injunctive relief in the bankruptcy court, but that motion was denied on April 3, 1984. J.A. at 41A-42A.

On April 12, 1984, COAP commenced a proceeding in the Connecticut Superior Court based upon Mrs. Robinson's alleged violation of probation. J.A. at 43A-45A. On April 26, 1984, Judge Drutman of the Superior Court entered an Order staying all further proceedings in the state court until there was a final determination made in federal court on the issue of the dischargeability of the restitution obligation. J.A. at 46A-48A.

Following a trial at the bankruptcy court on the merits of the case, the bankruptcy judge entered a Memorandum and Proposed Order, reported at 45 B.R. 423 (Bankr. D. Conn. 1984), denying all of the relief sought by Mrs. Robinson. The court concluded that Mrs. Robinson's restitution obligation was not a "debt" as defined in Code § 101 (11) and that therefore her liability to pay the restitution obligation was not affected by the bankruptcy proceedings. The court further concluded that even if the restitution obligation was a "debt" within the meaning of the Bank-

ruptcy Code, it was nondischargeable under Code § 523(a) (7) as a "penalty". The bankruptcy court relied upon its prior decision in the case of *In re Pellegrino*, 42 B.R. 129 (Bankr. D. Conn. 1984). The bankruptcy court's proposed order was adopted by the district court, and judgment was entered against Mrs. Robinson.

On appeal by Mrs. Robinson, the United States Court of Appeals for the Second Circuit reversed. Its opinion is reported at 776 F.2d 30 (2d Cir. 1985). The Second Circuit ruled that a restitution obligation is a debt as defined by Code § 101(11). The Court analyzed the Code definitions of the terms "debt" and "claim" and concluded that the terms were coextensive and that the definitions were sufficiently broad to include a restitution obligation as to which any person has a right to payment. App. to Pet. at 42A. The Court analyzed the legislative history of these Code provisions and concluded that the Congress sought the "broadest possible definition" of a "claim". App. to Pet. at 37A-42A. The Court further reasoned that the Congress dealt with the issue of monetory obligations arising out of criminal proceedings by making criminal fines, penalties and forfeitures (other than compensation for actual pecuniary loss) nondischargeable under Code § 523(a) (7), and not by excluding such criminal monetory obligations from the scope of the definitions of "debt" and "claim". App. to Pet. at 44A-45A. The Court viewed the Bankruptcy Code as a complex and carefully drawn statute in which obligations arising from the enforcement of criminal laws were carefully dealt with. App. to Pet. at 46A. The Court stated that COAP had a "right to payment", within the definition of the term "claim", because COAP had the right to receive payment from Mrs. Robinson and had the power to seek enforcement of its right. App. to Pet. at 47A.

Finally, the Court having determined that the restitution obligation was a "debt", the Court concluded that it was discharged under the circumstances of this particular case. The Court observed that had COAP or CDIM filed a complaint to determine nondischargeability of this debt pursuant to Code § 523(c) it suspected that the debt would have been excepted from discharge. The Court stated that COAP and CDIM waived their rights under that section by failing to file such a complaint. App. to Pet. at 50A. The Court went on to conclude that the debt was not nondischargeable under Code § 523(a)(7) as a fine, penalty or forfeiture because the debt represented to some extent "compensation for actual pecuniary loss". The Court based its conclusion upon the facts that the restitution obligation was fixed under state law with reference to the loss or damage caused by the offense, that the restitution order was in an amount precisely the same as the amount of public assistance benefits wrongfully received by Mrs. Robinson and that the restitution payments made to COAP are forwarded by it to CDIM. App. to Pet. at 48A-53A.

In a concurring opinion, Judge Mansfield stated that he believed a loophole existed in the Bankruptcy Code whereby a criminal could use bankruptcy to escape the obligation to make criminal restitution payments ordered by a court. He stated that he saw no valid reason for requiring the recipient of criminal restitution payments to file a complaint to determine nondischargeability of the restitution debt under Code § 523(c). He urged Congress to amend Code § 523(a)(7) to make criminal restitution payments nondischargeable in bankruptcy. App. to Pet. at 54A-55A.

SUMMARY OF ARGUMENT

1. Carolyn Robinson's Chapter 7 bankruptcy papers listed among her many creditors in her schedules her debt owing to the State of Connecticut, CDIM, for public assistance and her debt owing to the State of Connecticut, COAP, for "restitution" in the amount of $9,932.25. She was obligated to list all of her creditors in her schedules. The restitution obligation of $9,932.25 was based upon a larceny conviction arising out of the wrongful receipt of public assistance benefits from CDIM in the amount of $9,932.25 at a time when she was also receiving Social Security benefits. Ordinarily a debt based upon a larceny is not dischargeable in bankruptcy, Code § 523(a) (4), but if a creditor fails to file a complaint objecting to the dischargeability of the debt, within the time allowed by the Bankruptcy Court, the debt is discharged. Code § 523(c). The State of Connecticut, CDIM and COAP, were notified of the bankruptcy and of the time for filing complaints objecting to dischargeability; however, no such complaint was filed, and the restitution obligation was, therefore, discharged. Code § 523(c).

2. In an effort to escape the impact of the time bar imposed by § 523(c), the state argues that Mrs. Robinson's criminal restitution obligation is not a debt at all, and therefore is unaffected by bankruptcy, or in the alternative, even if it is a debt it is nondischargeable under an-

other section of the Code, § 523(a) (7), which is not subject to any time bar. Debt is defined in the Code as liability on a claim, and claim is broadly defined as a right to payment, whether equitable, legal, unmatured, contingent or unliquidated. The terms debt and claim are coextensive. The legislative history explicitly states that Congress intended the broadest possible definition to be given these terms so that all legal obligations of the debtor would be dealt with in the bankruptcy case. The Code refers to a fine, penalty or forfeiture as a debt, § 523(a) (7), and larceny as a debt, § 523(a) (4). The Code abolished the entire concept of provability which had limited the definition of debt under the prior Bankruptcy Act. Criminal restitution obligations fit within the extremely broadened definition of debt under the Code and are among the legal obligations to be dealt with in a bankruptcy case.

3. Petitioners' reliance upon cases under the prior Act which held that criminal fines and restitution orders were not debts is misplaced since those cases were generally controlled by the provability concept under the Act, and criminal fines and restitution orders were not provable. Petitioners' claim that there was no right to payment in this case, is incorrect. COAP had a right to receive the restitution payments and the power to seek enforcement of that right. CDIM had the right to receive those payments from COAP and the right to retain them. The State

of Connecticut, listed as creditor, had the most extensive bundle of rights: to prosecute, to collect and retain the payments and to enforce the restitution order.

4. The restitution obligation is not excepted from discharge under Code § 523(a) (7). That section provides for nondischargeability of debts to the extent that they are fines, penalties and forfeitures payable to and for the benefit of a governmental unit and are not compensation for actual pecuniary loss. Mrs. Robinson's restitution order represented compensation to the state and to CDIM for actual pecuniary loss and therefore was not excepted from discharge under § 523(a) (7). The restitution order is authorized under Connecticut law on the basis of the loss or damage caused by the offense; the order was for $9,932.25, the precise amount of the public assistance benefits wrongfully received; and the order was payable for the benefit of the injured party, the state and CDIM.

5. The distinguishing feature about restitution is that the victim is compensated for his pecuniary loss. In a number of jurisdictions, restitution has a definite civil dimension: the restitution order may be transferred to the civil docket and enforced as a civil judgment, the victim may himself enforce the restitution order, and payments made under the order are credited against any judgment the victim may obtain based upon the underlying incident.

In some jurisdictions, restitution has become a method of debt collection. Given the variety of approaches and practices respecting criminal restitution, it is understandable that Congress may not have wanted to make criminal restitution orders nondischargeable *per se*. This is particularly so with respect to state law and state prosecutions, since Congress lacks the power to enact state laws or regulate their enforcement. Congress would be delegating to the states the power to decide dischargeability, and debts which otherwise should be discharged in bankruptcy might be nondischargeable as restitution orders.

6. Any state law which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause. *Perez v. Campbell*, 402 U.S. 637, 652 (1971). Petitioners' effort to pit the doctrine of federalism, enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), against the Supremacy Clause of the United States Constitution must fail. Even if the restitution obligation is not considered a debt, the effort to collect the restitution after the underlying larceny debt has been discharged under § 523(c) violates the Supremacy Clause as articulated in *Perez*. Restitution obligations not otherwise excepted from discharge under § 523(a) are discharged as a result of the policies and priorities established by Congress in the Bankruptcy Code.

ARGUMENT

I. A CRIMINAL RESTITUTION OBLIGATION IS A DEBT

Carolyn Robinson's Chapter 7 bankruptcy papers, filed in the brankruptcy court on February 5, 1981, listed among her many creditors on her Schedule A-3 her debt owing to State of Connecticut, CDIM, for public assistance and her debt owing to State of Connecticut, COAP, for "restitution" in the amount of $9,932.25. (Record, Doc. No. 3). A debtor is obligated to list each of her creditors. Code §521(1); Bankruptcy Rule 1007(a) (1). At that time it was apparent that the restitution obligation might not be dischargeable in her bankruptcy since it was based upon a larceny, and debts based upon larceny are explicitly made nondischargeable in bankruptcy. Code § 523(a)(4). Indeed, an examination of her Schedule A-3 at that time would suggest that a purpose of her filing was to free her from her other debts in order to pay the restitution, rather than to attempt to discharge the restitution obligation, which appeared under § 523(a)(4) to be nondischargeable.

A creditor who claims that a debt is based upon larceny and therefore nondischargeable must file a timely complaint to determine the nondischargeability of the debt. It was only after the state waived its right to object, by allowing the time set by the bankruptcy court for filing such complaints under §523(c) to expire, that it became apparent that the restitution obligation might be discharged. Code § 523(c). To avoid the impact of the time bar imposed by § 523(c), the state argues that Mrs. Robinson's criminal restitution obligation is not a "debt" at all, and therefore is unaffected by bankruptcy, or in the alternative, even if it is a "debt" it is nondischargeable

under another section of the Code § 523(a)(7), which is not subject to any time bar.

A. The Scope Of The Term, "Debt"

The meaning of the term "debt" in the Bankruptcy Code should be examined, since it is "debts" which are discharged in bankruptcy. The Code provides:

> Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . .

11 U.S.C. § 727(b). The Code also provides:

> A discharge in bankruptcy
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727 . . .; [and]
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any debt as a personal liability of the debtor, . . .

11 U.S.C. § 524(a).

The term "debt" is defined in the Code as "liability on a claim." Code § 101(11). The term "claim" is broadly defined as

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to

> payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured; . . .

11 U.S.C. § 101(4).

The Bankruptcy Code differs significantly from the prior Bankruptcy Act in that the scope of the terms "debt" and "claim" are deliberately and explicitly expanded. The legislative history of Code § 101(4) states that:

> The effect of the definition is a significant departure from present law. Under present law, "claim" is not defined in straight bankruptcy. Instead it is simply used, along with the concept of provability in Section 63 of the Bankruptcy Act, to limit the kinds of obligations that are payable in a bankruptcy case. The term is defined in the debtor rehabilitation chapters of present law far more broadly. The definition in paragraph (4) adopts an even broader definition of claim than is found in the present debtor rehabilitation chapters . . . By this broadest possible definition, and by the use of the term throughout the title 11, especially in subchapter I of chapter 5, the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

House Report 95-595, 95th Cong. 1st Sess. 309 (1977); Senate Report 95-989, 95th Cong. 2d Sess. 21 (1978); *reprinted in* 1978 U.S. Code Cong. and Ad. News at 6266.[2]

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[2] Under the rehabilitation chapters, "debts" and "claims" were defined to include all claims, debts or demands "of whatever character", whether or not provable as debts. See 11 U.S.C. §§ 506(1) and (6), 707(2) and 1006(1) and (4) (repealed 1979) 1898 Bankruptcy Act §§ 106(1) and (6), 307(2) and 606(1) and (4).

Additional legislative history, indicating that the entire concept of provability of claims was abolisheed under the Code, is set forth in the Second Circuit's opinion in this case. (App. to Pet. at 38A). Abolishing provability greatly enlarged the scope of the term "claim." The legislative history of the definition of "debt" makes clear that, "The terms [debt and claim] are *coextensive*: a creditor has a 'claim' against the debtor; the debtor owes a 'debt' to the creditor." House Report at 310 (emphasis added), *reprinted in* 1978 U.S. Code Cong. and Ad. News at 6267. Clearly, a "debt" is to be construed equally as broadly as a "claim." The Second Circuit has set forth an extensive list of cases which have acknowledged the expanded scope of the definition of "claim", (App. to Pet. at 39A), which in turn indicate the expanded scope of a "debt."[3]

In addition to the broadened definition of debt, the Code refers to a fine, penalty or forfeiture as a "debt". Code § 523(a) (7). This is particularly noteworthy since the precise phrase, "Fines, Penalties And Forfeitures", constitutes the title heading of Chapter 229 in Title 18 of the U.S. Code dealing with crimes and criminal procedure.

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[3] This Court in the case of *Ohio v. Kovacs*, 105 S. Ct. 705, 711 (1985) strongly suggests that a criminal fine or penalty is a "debt" under the Code. In the context of that case, involving a debtor's wrongful violation of Ohio's environmental laws, and in connection with its statement that the debtor's discharge would not protect him from prosecution or from criminal contempt, the Court said ". . . had a fine or monetary penalty for violation of state law been imposed on Kovacs prior to bankruptcy, § 523(a)(7) forecloses any suggestion that his obligation to pay the fine or penalty would be discharged in bankruptcy." The inference to be drawn from this statement is that criminal fines and penalties are included within § 523(a)(7) as debts.

18 U.S.C. Chapt. 229. By using this same language in Code § 523(a)(7) it is evident that criminal monetary obligations were considered within the scope of "debt."[4] Section 523 (a)(7) made these obligations (except for those that were compensation for actual pecuniary loss) nondischargeable; but there would be no need for this provision if these obligations were not considered "debts."

It is also noteworthy that the term, "fine," is new in this context, not having appeared in the prior Bankruptcy Act in the provisions dealing with discharge, provability or allowability; "fine" has a well recognized criminal connotation. The Code also refers to a "debt" for "larceny", § 523(a)(4), another term with a clear criminal connotation. The prior Bankruptcy Act made no reference to larceny in relation to a debt, dischargeable or not. Now a larceny debt is explicitly referred to, and is made nondischargeable, § 523(a)(4), unless the creditor fails to file a complaint to determine nondischargeability, as here. Code § 523(c).

In *In re Brown*, 39 B.R. 820 (Bankr. M.D. Tenn. 1984), the bankruptcy court rejected the claim that a restitution obligation did not represent a "debt." The court's

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[4] Section 726(a)(4) also refers to a fine, penalty and forfeiture as a claim entitled to a distribution of property from the estate. In this section, fine, penalty or forfeiture is set forth as a concept separate from multiple, exemplary or punitive damages, suggesting again the criminal connotation to be given to the term fine, penalty or forfeiture. Under Code § 726(a)(4) fines and penalties are allowed to share in the distribution from the estate. This again is a change from the prior Act which limited allowability only to the amount of pecuniary loss. 11 fines and penalties are included within § 523(a)(7) as debts.

analysis, although a minority view among bankruptcy courts at present, is extremely persuasive, and is set forth in part as follows:

> If the Bankruptcy Code said that only orders to pay money by civil courts are debts for bankruptcy purposes, then credence could be given to the defendant's argument that a criminal court restitution order does not embody a "debt" dischargeable in bankruptcy. However, nothing in the Bankruptcy Code suggests that only civil courts enter orders to pay money that are subject to discharge in bankruptcy. A restitution order by a criminal court no less acknowledges the existence of a debt than an order of a civil court reducing that claim to judgment. The fact that a criminal court might participate in enforcement or collection of the debt between victim and debtor/defendant does not make the underlying obligation a "nondebt" for bankruptcy purposes.
>
> To win their argument, the defendants must first characterize the restitution order as being disembodied from the underlying "debt" created by Brown's actions. The defendants must then characterize the restitution order as something other than "debt" for bankruptcy purposes. What then is the restitution order? It acknowledges a "right to payment" yet defendants contend that this particular "right to payment" falls outside the notion of "right to payment" in § 101(4)(A). The restitution order confirms a "liability" of the defendant/debtor yet again, the defendants claim this particular "liability" exists beyond the notion of "liability" in § 101(11). The defendants' argument is nonsense. It requires a level of distortion of language most appropriate for the actions of legislatures and not courts. If the right of payment and the liability in a criminal court order of restitution were intended to be outside of the realm of debt for bankruptcy purposes, then how simple it would have been for Congress to include appropriate language in the Bankruptcy Code.

> The existence of a debt must be determined by substance not metaphysics (citations omitted). A restitution order of a state criminal court—whether it is characterized as embodying the pre-existing debt between the victim and the defendant debtor or if it is characterized as creating a separate obligation—is a "debt" for purposes of the Bankruptcy Code and is dischargeable in bankruptcy if not otherwise excepted from discharge.

39 B.R. at 822-823.

Since Congress intended the broadest possible definition to be given to "claims" and "debts" under the Code, abolished the concept of provability, and used new language with clear criminal connotations in defining nondischargeable debts under § 523(a), it is evident that criminal monetary obligations are included within the ambit of "debt".

B. Cases Under The Prior Bankruptcy Act

The cases under the prior Bankruptcy Act, referred to by petitioners in their brief, dealing with criminal fines and penalties generally stated that such criminal monetary obligations were not dischargeable in bankruptcy because they were not provable.[5] As noted by Collier:

> The Bankruptcy Act made no specific provision concerning the dischargeability of fines and penalties due to a governmental unit, but certain principles became well settled in this respect. Fines for violation of law, and forfeiture were not provable and therefore held to be not dischargeable. Generally, fines and penalties were not affected by discharge.

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[5] The case of *In re Alderson*, 98 F. 588 (D.W. Va. 1899) went the other way; the court held that a criminal fine resulting from a judgment in a state court was a provable debt and was dischargeable in bankruptcy.

3 Collier on Bankruptcy § 523.17 (15th Ed.) (footnotes omitted). The term "debt" itself was defined under the prior Act as ". . . any debt, demand or claim *provable* in bankruptcy" 11 U.S.C. § 1(14) (repealed 1979), 1898 Bankruptcy Act § 1(14) (emphasis added). And the Act specifically provided that only provable debts would be discharged in bankruptcy. 11 U.S.C. § 35a (repealed 1979), 1898 Bankruptcy Act § 17a.

The case of *In re Moore*, 111 F. 145 (W.D. Ky. 1901), holding that a criminal fine did not constitute a debt, contains the following reasoning, ". . . A fine, penalty, or costs imposed on the bankrupt as a penalty is not usually a provable debt. . . . we feel confident that they are not provable. . . . under all former acts they have been considered as not provable. . ." *In re Abramson*, 210 F. 878, 880 (2d Cir. 1914) held that a civil penalty was not provable in bankruptcy. The court stated that ". . . judgments for penalties are not debts which can be proved or allowed. . . ." In *Parker v. United States*, 153 Fed. 66 (1st Cir. 1946) the court held that a civil compensatory fine imposed in a contempt proceeding was a debt provable and dischargeable in bankruptcy. The court observed as to criminal contempt fines, ". . . Being not a provable debt, liability for such a criminal fine is not affected by a discharge in bankruptcy. . . ." The case of *Zwick v. Freeman*, 373 F. 2d 110 (2d Cir.) cert. denied, 389 U.S. 835 (1967), cited by petitioners, apparently does not involve the imposition of any monetary sanctions; the court in stating th t governmental sanctions are not regarded as debts cited the *Parker* and *Moore* cases for that proposition, and, as indicated, those cases consid-

ered a criminal fine not to be a debt because it was not provable. The case of *Spalding v. New York,* 45 U.S. (4 How.) 21 (1846), decided by this Court, contains no opinion explaining the basis of its decision; rather, this Court decided, because of differences among the justices as to the basis for their decisions, to affirm without further opinion the judgment of the New York court holding a criminal contempt fine nondischargeable.

The restitution cases under the prior Bankruptcy Act, referred to by the petitioners, do not change the picture. In *People v. Washburn,* 97 Cal. App. 3d 621, 158 Cal. Rptr. 822, 825 (1979) the court held a restitution obligation nondischargeable, stating the ". . . bankruptcy obviously relates to 'provable debts' (see e.g., 11 U.S.C. § 1 (14)) but that amount ordered to be paid by the municipal court as restitution is not a 'debt' within the meaning of the bankruptcy law." *People ex rel. Auerbach v. Topping Bros.,* 79 Misc. 2d 260, 359 N.Y.S. 2d 985 (Crim. Ct. 1974) does not appear to involve any restitution order whatsoever, and so it is inapplicable.

This review of cases under the prior Bankruptcy Act indicates that criminal fines and penalties, including restitution orders, were generally not considered "debts" because they were not considered provable or allowable. As already indicated, the current Bankruptcy Code has made a major change in these areas. The concept of provability has been abolished. Fines, penalties and forfeitures are now allowed. Code § 726(a)(4). And "claims" and "debts" are to be given the broadest possible definition. Congress has made

its intent clear to change these concepts which existed under the prior Bankruptcy Act. See *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755, 759-760 (1986). Accordingly, the foregoing cases decided under the prior Act are not applicable to the question of whether Mrs. Robinson's restitution order was discharged in her bankruptcy under the Code.

C. The Right To Payment

Petitioners argue that a criminal restitution order cannot be a "debt" or a "claim" because neither the crime victim nor the state court system has a right to payment. The Second Circuit's opinion persuasively demonstates that COAP had a right to payment. App. to Pet. at 46A-48A. Since Congress intended the broadest possible definition for "debt" and "claim", the phrase "right to payment" should be interpreted liberally and broadly consistent with Congressional intent.

Not only does COAP have the right to receive payment from Mrs. Robinson and the power to seek enforcement of that right under Connecticut's statutory scheme, see App. to Pet. at 46A-47A, but the victim also has the right to receive those payments from COAP and the right to retain them. In this case, since both COAP and CDIM are state agencies, and since the State of Connecticut was listed as creditor with respect to both agencies, the situation may also be viewed as one in which the state is prosecuting and collecting for itself, and in which the victim thereby has an even more extensive bundle of rights. See *State v. Duncan*, 438 A.2d 1212, 1214 (App. Sess. 1981) (ruling that the State of Connecticut rather than the agency is the creditor to whom the debt is owing).

Frequently, a creditor under state law may possess a valid claim, but the debtor, due to various federal and state exemption laws, may be judgment proof, and his income and assets may be exempt from the claims of his creditors. Such a creditor may have a right to payment contingent upon there being any available income or assets to be reached, but his right to actually obtain any payment might be non-existent because of federal and state exemption laws. COAP's right to payment was firmly established by the Connecticut Superior Court's order. The court ordered as a special condition of Mrs. Robinson's probation: "Restitution in the amount of $9,932.95 at $100 per month commencing 1-16-81." J.A. at 21A. Any statutory income or property exemptions she might have had were irrelevant with respect to her obligations under the restitution order. It is well recognized that restitution orders, like contempt sanctions, can be a far more effective means of collecting payments than ordinary court judgments. See *In re Brown*, 39 B.R. 820, 824 (Bankr. M.D. Tenn. 1984); *In re Whitaker*, 16 B.R. 917, 922 (Bankr. M.D. Tenn. 1982); *In re Taylor*, 16 B.R. 325, 327 (Bankr. D. Md. 1981); *In re Griffin*, 13 B.R. 591, 592 (Bankr. S.D. Ohio 1981). In view of the extremely broadened definitions of "debt" and "claim" the Second Circuit was correct in its conclusion that Mrs. Robinson's criminal restitution obligation was a "debt" under the Code.

II. THE RESTITUTION OBLIGATION WAS DISCHARGED IN BANKRUPTCY

A. No Objection To The Dischargeability Of The Restitution Obligation Was Filed Under § 523(c)

Mrs. Robinson's restitution obligation was in existence at the time she filed her bankruptcy, and it was listed in her schedules.[6] On February 20, 1981, the bankruptcy court notified both CDIM and COAP of Mrs. Robinson's Chapter 7 petition, and informed each of them that April 27, 1981 was the last day for the filing of objections to discharge and "complaints to determine the dischargeability of any debt pursuant to 11 U.S.C. § 523(c)." J.A. at 10A-12A. Additional time for the filing of such a complaint could have been obtained by either petitioner pursuant to Bankruptcy Rule 4007(c). Neither CDIM nor COAP ever filed any complaint to determine the nondischargeability of the restitution obligation. Accordingly, pursuant to Code § 523(c), the petitioners waived their rights to object to the dischargeability of the restitution obligation, and that debt was, therefore, discharged.[7]

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[6] This fact distinguishes the cases of *United States v. Carson*, 669 F.2d 216 (5th Cir. 1982) and *United States v. Alexander*, 743 F.2d 472 (7th Cir. 1984) which were concerned with criminal restitution orders entered after the debtor had obtained a discharge in bankruptcy, and the cases of *Barnette v. Evans*, 673 F.2d 1250 (11th Cir. 1982) and *In re Davis*, 691 F.2d 176 (3d Cir. 1982) which involved debtors in pending bankruptcy proceedings in which restitution obligations had not yet been entered. This is a significant distinction since a debt must already be in existence at the time of the filing of a bankruptcy petition in order for it to be affected by the bankruptcy discharge. Code § 727(b). See App. to Pet. at 42A-44A.

[7] The bankruptcy court and the district court did agree that the larceny debt was discharged in Mrs. Robinson's bankruptcy pursuant to Code § 523(a). App. to Pet. at 4A.

It is well recognized that a debt which might otherwise be nondischargeable in bankruptcy under § 523(a)(2) (fraud, false pretenses or false representations), § 523(a)(4) (larceny, embezzlement, defalcation or fraud) or § 523(a)(6) (willful and malicious injury) will nevertheless be discharged in the debtor's bankruptcy unless a timely complaint is filed in the bankruptcy court objecting to the dischargeability of that debt. 11 U.S.C. § 523(c); Bankruptcy Rule 4007(c); *In re Gutierrez,* 15 B.R. 268 (N.D. Ill. 1981) (overpayment of $9,453.10 in Social Security benefits, where receipt by debtor was wrongful, held discharged in bankruptcy, and Social Security Administration ordered to refund money subsequently deducted from debtor's benefits); *In re Hawley,* 23 B.R. 236 (Bankr. E.D. Mich. 1982); *In re Rowan,* 15 B.R. 834 (Bankr. N.D. Ohio 1981). Bankruptcy adversary proceedings are not unduly complex or burdensome; the rules of procedure are similar to those applicable in district courts; and collateral estoppel is generally available. See *In re Eadie,* 51 B.R. 890 (Bankr. E.D. Mich. 1985).

B. The Restitution Obligation Was Not Excepted From Discharge Under § 523(a)(7) Since It Represented Compensation For Actual Pecuniary Loss

To escape the impact of Code § 523(c), petitioners argue that the restitution obligation should be considered nondischargeable under § 523(a)(7). Since nondischargeable debts of the § 523(a)(7) variety are not subject to the requirements of § 523(c), the petitioners would not be required to file a complaint in the bankruptcy court objecting to dischargeability, and they would not be subject to a time bar. For a debt to be nondischargeable under § 523(a)(7) it must be a "fine, penalty or forfeiture," and it must meet each of the following three criteria:

1. it must be payable to a governmental unit;
2. it must be payable for the benefit of a governmental unit; and
3. it must not be compensation for actual pecuniary loss.

Since many criminal restitution obligations are payable for the benefit of a private party victim they could never be nondischargable under § 523(a)(7). In the present case, although the restitution obligation is payable for the benefit of a state agency victim, it still does not come within the nondischargeability ambit of § 523(a)(7) because it represents "compensation for actual pecuniary loss."

The exceptions to discharge must be strictly construed in favor of the debtor, to foster comprehensive relief and provide the fresh start which was intended by Congress. See *Perez v. Campbell,* 402 U.S. 637, 648 (1971); *Gleason v. Thaw,* 236 U.S. 558, 562 (1915); *Murphy and Robinson Investment Co. v. Cross,* 666 F.2d 873, 879-880 (5th Cir. 1982); *Houtman v. Mann,* 568 F.2d 651, 656 (9th Cir. 1978); *Household Finance Co. v. Danns,* 558 F.2d 114, 116 (2nd Cir. 1977). The burden of proof lies with the creditor to demonstrate that the particular debt falls within one of the statutory exceptions. *Murphy and Robinson Investment Co.* at 880. The dischargeability of a debt "must be determined by the substance of the liability rather than its form." *In re Spong,* 661 F.2d 6, 9. A court is obliged to look at the plain language of the sections of the Code. "Where, as here, the statutory language clearly expresses the congressional intent, a court may not read another meaning into the statute in order to arrive at a result which the court deems preferable." *In re Flagstaff Food Service Corporation,* 739 F.2d 73, 75 (2d Cir. 1984).

As originally proposed, the exception to dischargeability, now incorporated in § 523(a)(7), was articulated as a "liability to the extent it is for a fine for the benefit of a federal, state, or local government . . ." Report of the Commission on the Bankruptcy Laws, Part II, at 136 (1973). The rationale behind this proposal was stated as follows:

> It is intended to clarify and rationalize the dischargeability status of debts for nonpecuniary loss, i.e., debts for fines, penalties, or forfeitures or for multiple, punitive, or exemplary damages. Under the present Act it has become "well settled" that "fines and penalties are not affected by a discharge." 1A Collier ¶ 17.05, at 1586(1967). Such debts have been regarded as not dischargeable because they are not provable. However, debts owed to governments for fines, penalties, and forfeitures are expressly not allowable under § 57 of the present Act, notwithstanding the general rule that nonprovable debts are not subject to allowance. . . .
>
> The proposed Act abandons the concept of "provability," . . . and permits all debts which can be liquidated as of the date of the petition (and certain other debts) to be allowed and discharged unless expressly excepted. The proposed Act does not disallow debts for nonpecuniary losses but subordinates their payment. See §§ 4-403(b), 4-406(a)(3). This clause denies dischargeability only to a fine for the benefit of a governmental unit. All other nonpecuniary debts, including a fine payable to a governmental unit but for the benefit of a private individual, are to be discharged unless they are expressly nondischargeable under another clause of this subdivision, or . . . arise from the same course of conduct as compensatory damages that are nondischargeable.

Report of the Commission on the Bankruptcy Law, Part II, at 141 (1973). The reference to Collier indicates that

criminal fines and penalties were being addressed. The Commission's rationale makes clear that fines representing nonpecuniary loss were to be nondischargeable, and it clearly implies that fines and penalties representing pecuniary loss, such as restitution, were to be discharged unless nondischargeable under another provision; this became more explicit in the current language of § 523(a) (7) with the adoption of the exclusionary clause, "and is not compensation for actual pecuniary loss."

The Second Circuit's analysis and conclusion that the restitution obligation in this case represented compensation for actual pecuniary loss within the meaning of § 523 (a)(7) is correct. See App. to Pet. at 50A-53A. The state court may order restitution for the fruits of the offense or "for the loss or damage caused thereby." Conn. Gen. Stat. § 53a-30(a)(4). The restitution order was for $9,932.-95, the precise amount of money wrongfully received by Mrs. Robinson. J.A. at 21A-22A and 43A-44A. And the restitution payments made by Mrs. Robinson to COAP are subsequently forwarded to CDIM. the victim.

Since restitution performs the clear and distinct function of providing compensation for actual pecuniary loss, it is not nondischargeable under § 523(a)(7). Criminal restitution, in providing compensation to the victim, performs a decidedly civil function, and it is one of those areas of the law where the civil and criminal processes overlap. Because of the significance of the concept of restitution in this case, some further analysis of restitution is appropriate.

C. The Distinguishing Feature Of Restitution Is That The Victim Is Compensated

Contrary to fines and imprisonment, restitution involves compensating the victim of the crime in the sanc-

tioning process. Though restitution may be for punitive and rehabilitative purposes, it invariably and undeniably has compensatory purposes as well. Note, "Victim Restitution In The Criminal Process: A Procedural Analysis," 97 Harv. L. Rev. 931, 936-937 (1984). The distinguishing characteristic of restitution is that the victim is returned her/his loss. Indeed the recent evolution of restitution has been based in large part on a concern that victims are neglected in the criminal process, Victim And Witness Protection Act of 1982, Pub. L. 97-291, § 2(a), 96 Stat. 1248 (1982); Victim And Witness Protection Act of 1982, S. Rep. No. 532, 97th Cong. 10, *reprinted* in 1982 U.S. Code Cong. & Ad. News at 2516 (1982).[8] *See also* R. E. Barnett & J. Hagel III, "Assessing the Criminal: Restitution, Retribution and the Legal Process," in *Assessing the Criminal: Restitution, Retribution and the Legal Process* 1 (R.E. Barnett & J. Hagel III eds. 1977) (volume hereinafter "*Assessing the Criminal*"); R.A. Epstein, "Crime and Tort: Old Wine in Old Bottles," in *Assessing the Criminal* 231; W.F. McDonald, "The Role of the Victim in America," in *Assessing the Criminal* 295. For example, the stated goal of the Victim And Witness Protection Act of 1982 is to "ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime . . .," Pub. L. No. 97-291, § 2(b)(2), 96 Stat. 1248, 1249 (1982). To carry out

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[8] Also of concern was that criminal sanctions are often ineffective. Cf. B. Galaway, "Restitution as an Integrative Punishment," in *Assessing the Criminal: Restitution, Retribution and the Legal Process* 331 (R.E. Barnett & J. Hagel III eds. 1977) volume hereinafter *"Assessing the Criminal"*); R.E. Barnett, "Restitution: A New Paradigm of Criminal Justice," in *Assessing the Criminal* 349; K. Menninger, *The Crime of Punishment* (1968).

this goal, a court may order restitution to the victim or to the victim's estate. As professor Abraham S. Goldstein noted:

> The federal restitution provisions, like others recently enacted in many states, place restitution on its own bottom. They make it plain that a debt to the *victim* is to be repaid in the criminal case, not only a "debt to society." From the perspective of comparative law, it seems that we may be evolving towards a system which resembles the French *partie civile* and the "adhesion" processes known to European systems. These do not divorce the so-called "private" interest of the victim in damages from the "public" interest in the criminal prosecution.

A.S. Goldstein, "A New Role For The Victim? — The Federal Victim Protection Act of 1982", 100 F.R.D. 94, 98 (1983) (emphasis in original).

An important component of the Victim And Witness Protection Act of 1982, *supra* was the addition of a victim impact statement to the presentence report. The presentence report now must contain information concerning any type of harm "including *financial* . . . harm, done to or loss suffered by any victim of the offense," and "any other information that may aid the court in sentencing, including *the restitution needs of any victim* of the offense," Fed. R. Crim. P. 32(c)(2) (emphasis added).

That a major purpose of restitution is to compensate the victim for pecuniary losses has been recognized by many states. Indeed a number of states have declared that it is the policy of the state that the victim be compensated for her/his losses, and thus should be awarded restitution, E.g. Alabama, Ala. Code § 15-18-65 (1985) ("The legisla-

ture hereby finds, declares and determines . . . that all perpetrators of criminal activity or conduct be required to fully compensate all victims of such conduct or activity for any pecuniary loss, damage or injury as a direct or indirect result thereof."); Arkansas, Ark. Stat. Ann. § 43-2350 (1985) ("The General Assembly recognizes that many innocent persons suffer injury, death, property damage and resultant financial hardship as a result of crimes committed in this State, and that there is a genuine need in this State to establish a method whereby the responsible offender, as far as practicable, may be required to make restitution to his victim so as to make that victim whole with respect to the financial injury suffered."); New Mexico, N.M. Stat. Ann. § 31-17-1.A (1985) ("It is the policy of this state that restitution be made by each violator of the Criminal Code of New Mexico to the victims of his criminal activities to the extent that defendant is reasonably able to do so . . . '[R]estitution' means full or partial payment of actual damages to a victim."); South Dakota, S.D. Codified Laws Ann. §§ 23A-28-1 and -2(4) (1985) ("It is the policy of the state that restitution may be made by each violator of the criminal laws to the victims of his criminal activities to the extent that the violator is reasonably able to do so." "'Restitution' means full or partial payment of pecuniary damages to a victim[.]") This civil nature to the restitution order makes it different from other sanctions. In North Carolina,

> [r]estitution and reparation are ancillary remedies to promote rehabilitation of criminal offenders and to provide for compensation to victims of crime, and shall not be construed to be a fine or other punishment as

provided for in the Constitution and laws of this State.

N.C. Gen. Stat. § 15A-1343(d) (1985).

D. Restitution, Under Federal Law Has A Civil Aspect

Because the emphasis is on compensating the victim, restitution orders take on forms different from fines. Notably in the federal system, restitution may be ordered in addition to any other penalty, 18 U.S.C. § 3579(a)(1) (1986). When restitution is for property loss, the amount of the restitution is the value of the property lost, *id.* § 3579 (b)(1)(B). Restitution compensates for losses actually sustained by the victim, such as medical expenses, or lost wages, *id.* § 3579(b)(2). In keeping with the statute's emphasis on the victim, the court must impose an order of restitution "to the extent that such order is as fair as possible to the victim," *id.* § 3579(d). The victim may get restitution only for that part of the loss for which s/he does *not* receive compensation, *id.* § 3579(e)(2). Restitution may be ordered "to any person who compensated the victim for such loss to the extent that such person paid the compensation," *id.* § 3579(e)(1). Restitution is made to the victim, and the victim may individually enforce the restitution order in the same manner as a judgment in a civil action, *id.* § 3579(h). In keeping with the civil nature of the restitution order, any dispute involving the amount or type of restitution is to be resolved by a preponderance of the evidence, and not beyond a reasonable doubt which

is the level of proof required in criminal matters, *id.* § 3580(d). In addition, if an order of restitution is imposed, the defendant is estopped from denying essential allegations of the offense in any subsequent civil proceeding, *id.* § 3580(e).

Because restitution is civil in nature the order of restitution is not necessarily discharged if the defendant dies. In *United States v. Dudley,* 739 F.2d 175 (4th Cir. 1984), the Fourth Circuit found that though purely penal sanctions are extinguished by the defendant's death, a restitution order does not abate and may be charged to the defendant's estate. The court stated:

> It does not require great perspicacity to appreciate the substantial difference between *restitution* to the person victimized by the crime . . . and *forfeiture,* collectible only by the avenging United States government bent on punishing an offender.
>
> Hence we are not impressed by purely verbal logic. "A crime is a crime is a crime" simply does not serve to resolve the dispositive issue.

Dudley, 739 F.2d at 177 (emphasis supplied by court). The court found that since restitution's predominant purpose is to be compensatory, and is to be enforced in the same manner as any other civil judgment, the obligation to make restitution does not abate with the defendant's death. *Id.* at 177-178.

E. Restitution Under Various State Laws Has A Civil Aspect

Because restitution has a civil nature to it, many states treat restitution like civil monetary judgments. In some states the restitution order is transferred to the

civil docket and may be enforced as any civil judgment. E.g., Delaware, Del. Code Ann. tit. 11, § 4101(b) (1984) ("If [an order to pay a fine, costs, or restitution is] not paid promptly upon its imposition or in accordance with the terms of the order of the court, the clerk or Prothonotary shall cause the judgment to be entered upon the civil judgment docket of the court whence it may be executed and enforced or transferred in the same manner as other judgments of the court; provided, however, that where a stay of execution is otherwise permitted by law such a stay shall not be granted as a matter of right but only within the discretion of the court."); Minnesota, Minn. Stat. Ann. § 611A.04 Subd. 3 (West 1986) ("An order of restitution shall be docketed as a civil judgment by the clerk of the district court in the county in which order of restitution was entered."); Utah, Utah Code Ann. § 77-18-1(9) (1985) ("The prosecutor shall provide notice of the restitution order to the clerk of the court. The clerk shall place the order on the civil docket and shall provide notice of the order to the parties. The order shall be treated as a legal judgment under which the victim may seek civil remedy."); New York, N.Y. Crim. Proc. Law § 420.10.6 (Consol. 1986) ("The court's order [of fine, restitution or reparation] also shall direct the district attorney to file a certified copy of such order with the county clerk . . . Such order shall be entered by the county clerk in the same manner as a judgment in a civil action.

A number of states specifically allow the victim to enforce a restitution order.[9] E.g., Alabama, Ala. Code

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[9] In New Mexico, the victim "may request, and the court shall grant a hearing on any matter related to the plan of restitution[,]" N.M. Stat. Ann. § 31-17-1.F (1985).

§ 15-18-78(a) (1985) ("A restitution order in a criminal case shall be a final judgment and have all the force and effect of a final judgment in a civil action under the laws of the state of Alabama. The victim on whose behalf restitution is ordered the executor or administrator of the victim's estate, or anyone else acting on behalf of the victim shall be entitled to all the rights and remedies to which a plaintiff would be entitled in a civil action under the laws of this state as well as any other right or remedy pertaining to such restitution order as may be provided by law."); Florida, Fla. Stat. Ann. § 775.089(5) (West 1985) ("An order of restitution may be enforced by the state, or a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action."); Georgia, Ga. Code Ann. § 17-14-13(b) (1985) ("If an offender willfully refuses to comply with a restitution order, the order, in the discretion of the court may be enforced by attachment for contempt, upon the application of the prosecuting attorney or the victim."); Idaho, Idaho Code § 19-5305 (1985) ("After forty-two (42) days from the entry of the order of restitution or at the conclusion of a hearing to reconsider an order of restitution, whichever occurs later, an order of restitution may be recorded as a judgment and the victim may execute as provided by law for civil judgments."); Minnesota, Minn. Stat. Ann. § 611A.04 Subd. 3 (West 1986) ("An order of restitution may be enforced by any person named in the order to receive the restitution in the same manner as a judgment in a civil action."); Missouri, Mo. Ann. Stat. § 546.640 (Vernon 1986) ("The party injured shall have a lien on the estate of the criminal from the time of his arrest, subject to any lien granted by law to the state."); South Dakota,

S.D. Codified Laws Ann. §23A-28-1 (1985) ("An order of restitution may be enforced by the state or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action."); Utah, Utah Code Ann. § 77-18-1(9) (1985) ("The prosecutor shall provide notice of the restitution order to the clerk of the court. The clerk shall place the order on the civil docket and shall provide notice of the order to the parties. The order shall be treated as a legal judgment under which the victim may seek civil judgments.")

Though restitution orders do not bar the victim from suing the defendant for damages sustained as a result of the defendant's activities, the damages received by the victim in the civil suit typically must be offset by the restitution already received. E.g. Alabama, Ala. Code § 15-18-75 (1985) (". . . the court shall credit any restitution paid by the defendant to a victim against any judgment in favor of the victim in [a] civil action."); Delaware, Del. Code Ann. tit. 11, § 4106(e) (1984) ("A civil verdict shall be reduced by the amount of restitution paid under the criminal restitution order."); Florida, Fla. Stat. Ann. § 775.089(8) (West 1985) (". . . the amount of such restitution shall be set off against any subsequent independent civil action."); Georgia, Ga. Code Ann. § 17-14-11 (1985) (". . . any payments made by an offender to a victim under an order for restitution may be a set off against any judgment awarded to the victim in a civil action based on the same facts for which restitution was ordered."); Indiana, Ind. Code Ann. § 35-50-5-3(b) (Burns 1985) ("An order of restitution under subsection (a) does not bar a civil action for *other* damages suffered by the victim.") (Emphasis added); Iowa, Iowa Code Ann. § 910.8 (West

1985) (". . . any restitution payment by the offender to the victim shall be set off against any judgment in favor of the victim in a civil action arising out of the same facts or event."); Kentucky, Ky. Rev. Stat. § 533.030(3) (g) (1985) ("A civil verdict shall be reduced by the amount paid under the criminal restitution order."); Maine, Me. Rev. Stat. Ann. tit. 17-A, § 1327 (1985) ("Any restitution ordered and paid shall be deducted from the amount of any judgment awarded in a civil action brought by the victim against the offender based on the same facts. If the restitution ordered and made was work restitution, the reasonable value of the services may be deducted from any such judgment."); Maryland, Md. Ann. Code art. 27, § 640(f) (1985) ("A civil verdict shall be reduced by the amount paid under the criminal restitution order."); Minnesota, Minn. Stat. Ann. § 611A.04 Subd. 3 (West 1986) ("The offender shall be given credit, in any order for judgment in favor of a victim in a civil action, for any restitution paid to the victim for the same injuries for which the judgment is awarded."); Mississippi, Miss. Code Ann. § 99-37-17(1) (1985) (". . . the court shall credit any restitution paid by the defendant to a victim against any judgment in favor of the victim in [a] civil action."); Montana, Mont. Code Ann. § 46-18-249(3) (1985) ("Any restitution paid by the offender to the victim must be set off against any pecuniary loss awarded to the victim in a civil action arising out of the facts or events which were the

basis for the restitution."); New Mexico, N.M. Stat. Ann. § 31-17-1.H (1985) (". . . any restitution payment by the defendant shall be set off against any judgment in favor of the victim in a civil action arising out of the same facts or events."); North Carolina, N.C. Gen. Stat. § 15A-1343(d) (1985) (". . . any amount paid by the defendant under the terms of an order as provided herein [a restitution order] shall be credited against any judgment rendered against the defendant in [a] civil action."); Oregon, Or. Rev. Stat. § 137.109(1) (1985) (". . . the court shall credit any restitution paid by the defendant to a victim against any judgment in favor of the victim in [a] civil action."); Utah, Utah Code Ann. § 3-201.2(1) (1985) (". . . the court shall credit any restitution paid by the defendant to a victim against any judgment in favor of the victim in [a] civil action."); Wisconsin, Wis. Stat. Ann. § 773.09(7) (West 1985) ("Any restitution paid by the probationer to the victim shall be set off against any judgment in favor of the victim in a civil action arising out of the facts or events which were the basis for the restitution."); Wyoming, Wyo. Stat. § 7-13-314(a) (". . . any restitution payment by the defendant to a victim shall be set off against any judgment in favor of the victim in a civil action arising out of the same facts or events.").

F. Restitution Clearly Has A Compensatory Aspect To It Since In Some States, Criminal Restitution Has Become One Method Of Debt Collection

Debt collectors have used the criminal process to collect debts, especially when dealing with bad check prosecutions. See D. Rendleman, *The Bankruptcy Discharge: Toward A Fresher Start,* 58 N.C.L. Rev. 723, 736. Many states require mandatory restitution if the debtor is convicted of passing bad checks, e.g. Washington, Wash. Rev. Code Ann. § 9A.56.060(5) (1986) ("Unlawful issuance of a bank check in an amount of two hundred fifty dollars or less is a gross misdemeanor and shall be punished as follows: (a) The court shall order the defendant to make full restitution; . . ."). Creditors will often force the debtor to make payment on the bad check by either threatening or carrying through a criminal prosecution. A Tennessee court has noted:

> It is a matter of common knowledge that creditors in Tennessee frequently resort to the threat of a criminal prosecution to compel the payment of a civil debt. In many, if not most instances, criminal prosecutions brought under the bad check and similar statutes are ultimately resolved by the criminal charges being withdrawn in return for the payment of restitution and costs by the defendant. This is so engrained in the criminal system of this state that the creditor Martin referred to his practice of dealing with bad checks as "turn[ing] them into the Sessions Court *for collection.*"

In re Whitaker, 16 B.R. 917, 922 (Bankr. M.D. Tenn. 1982) (emphasis in original). Another court noted:

> *It is quite clear that the vast majority of merchants and others who receive worthless checks regard law enforcement officers and the courts as mere agencies to collect their money.* . . . This attitude prevails in other states where surveys show *a significant number* . . . [of merchants] *rely upon* . . . [worthless (sic) statutes] *rather than upon a civil remedy* . . . .

In re Barnett, 15 B.R. 504, 507 (Bankr. Kan. 1981) (citations omitted; emphasis in original); See also *In re Brown*, 39 B.R. 820, 824 (Bankr. M.D. Tenn. 1984) ("Creditors use (and abuse) state criminal process as a technique for collection of debt"). This form of debt collection has not been limited to bad checks. Courts have recognized that the criminal process was being used to collect civil debts in the case of homeowners who attempted to collect from a bankrupt contractor, *Matter of Van Riper*, 25 B.R. 972 (Bankr. W.D. Wis. 1982) (Homeowners could not take steps to collect debt from bankrupt contractor by using criminal process without first seeeking relief from automatic stay, therefore, mortgage note and foreclosure held void, and homeowner creditor and his attorney found in contempt.), and in the case of criminal nonsupport, *In re Kaping*, 13 B.R. 621 (Bankr. Ore. 1981) (State of Oregon enjoined from prosecuting debtor for criminal nonsupport when reason for prosecution was to collect support payments discharged in bankruptcy.).

A number of Bankruptcy Courts have enjoined criminal prosecution against the debtor because they found that the reason for the prosecution was to collect on a debt.[10]

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[10] See *In re Goree*, 46 B.R. 697 (D.C.W.D. Ky. 1984). *In re Curley*, 25 B.R. 59 (Bankr. S.D. Ohio 1982); *In re Alan I.W. Frank*

(Continued on following page)

The creditor would try to collect by getting criminal restitution. In the bankruptcy context, the question frequently addressed was whether a creditor was trying to use the criminal process to gain an advantage over other creditors similarly situated, and frustrate the purposes of the Bankruptcy Code. If so, the prosecution should be enjoined. Cf. *In re Lake,* 11 B.R. 202 (Bankr. S.D. Ohio 1981) (Court permanently enjoined criminal proceedings instituted by collection agency, its clients and their agents, when instituted solely to collect bad check debt.).

Considering the wide variety of approaches to criminal restitution existing in various jurisdictions, the distinct civil aspect of criminal restitution in many instances, the involvement of the victim in determining the amount of the order and in enforcing that order, and especially considering the abuse that has been revealed in the use of the criminal process to collect civil debts, it is understandable that Congress may not have wanted to make criminal restitution orders nondischargeable *per se.* Particularly is this so with respect to state law and state prosecutions, since the Congress lacks the power to enact state laws or regulate their enforcement. Congress would be delegating to the states

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Corp., 19 B.R. 41 (Bankr. E.D. Pa. 1982); *In re Strassman,* 18 B.R. 346 (Bankr. E.D. Pa. 1982); *In re Whitaker,* 16 B.R. 917 (Bankr. M.D. Tenn. 1982); *In re Kaping,* 13 B.R. 621 (Bankr. D. Or. 1981); *In re Bray,* 12 B.R. 359 (Bankr. M.S. Ala. 1981); *In re Lake,* 11 B.R. 202 (Bankr. S.D. Ohio 1981); *In re Reid,* 9 B.R. 830 (Bankr. M.D. Ala. 1981); *In re Caldwell,* 5 B.R. 740 (Bankr. W.D. Va. 1980); *In re Barth,* 4 B.R. 141 (Bankr. W.D. Mo. 1980).

Cases in which criminal prosecutions were enjoined under the former Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978), include: *In re Penny,* 414 F. Supp. 1113 (W.D.N.C. 1976); *In re Burke,* Bankr. L. Rep. (CCH) ¶ 66,368 at 76,200 (E.D. Tenn. Oct. 22, 1976); *In re Hassinger, Inc.,* 20 B.R. 517 (Bankr. E.D. Pa. 1982).

the power to decide dischargeability on the basis of what any particular state allowed or labelled as a criminal restitution order. By allowing all state criminal restitution orders to be nondischargeable *per se* Congress would be creating a "loophole" in the bankruptcy laws, allowing creditors to collect on claims that might well be discharged in bankruptcy. Claims for bounced checks, "larceny", running a stop sign and operating a motor vehicle without insurance could be used to urge prosecution and obtain restitution orders for debts or auto accidents which would ordinarily be discharged. See *In re Brown*, 39 B.R. 820, 824 (Bankr. M.D. Tenn. 1984); see also *In re Cornell*, 44 B.R. 528 (Bankr. Conn. 1985)[11] (conviction of operating a motor vehicle without insurance resulted in a criminal restitution order for the amount of damage done to the other person's car).

G. The Effect Of The Supremacy Clause

Mrs. Robinson's restitution obligation was in existence prior to the filing of her bankruptcy. Accordingly, if her restitution obligation does not fall within one of the exceptions to discharge under § 523(a), and is determined to be discharged under §§ 727(b) and 524(a), the state's efforts to enforce and collect the order must cease pursuant to mandate of the Supremacy Clause, U.S. Constitution, Article VI, Clause 2.[12] Nor may the state seek to revoke Mrs. Robinson's probation solely for not paying a debt dis-

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[11] The *Cornell* ruling was ordered modified by the U.S. District Court in light of the Second Circuit's decision in this case; an appeal was then taken to the Second Circuit and was voluntarily dismissed without prejudice to renewal within thirty days of the final decision by this Court in this case.

[12] Even if the restitution obligation is considered not to be a "debt" under Code § 101(11), the enforcement of the restitu-

(Continued on following page)

charged in bankruptcy. See Code § 525. See also *Perez v. Campbell*, 402 U.S. 637, 652 (1971) ("any state law which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause").

The petitioners urge that the principles of comity and federalism set forth in *Younger v. Harris*, 401 U.S. 37 (1971) should lead to a determination that criminal restitution obligations cannot be discharged in bankruptcy. The *Younger* doctrine does not relate to the issue of the dischargeability of debts in bankruptcy. Debts owing to states and debts resulting from state court judgments are clearly dischargeable in bankruptcy. See Code §§ 524(a) and 525(a). The *Younger* doctrine involves the issue of abstention by a federal court from enjoining a state court proceeding. However, in the present case the state court ordered a stay of the state criminal proceedings pending a final determination of the bankruptcy dischargeability question by the federal court. J.A. at 46A-48A. Accordingly, the *Younger* doctrine does not apply to this case.

Petitioners also argue that if § 523(a)(7) does not apply to criminal restitution obligations there may be occasions in the future when certain criminal restitution obligations would fall outside the scope of the various nondischargeable debt categories listed under § 523(a) and would, therefore, be discharged in bankruptcy. Of course, this

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tion order against Mrs. Robinson after the underlying larceny debt has been discharged impacts upon the Supremacy Clause. A state law may not conflict with or interfere with the accomplishment and execution of the full purposes and objectives of Congress under the Bankruptcy Code. See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See also, *In re Davis*, 691 F.2d 176, 178 (3d Cir. 1982) wherein the court, although abstaining from exercising jurisdiction, noted that a restitution order regarding a discharged debt may raise serious questions under the Supremacy Clause.

argument does not apply to the present case since the present restitution obligation would have been nondischargeable under either § 523(a)(2) or § 523(a)(4) if petitioners had filed a complaint in the bankruptcy court. Petitioners cite at p. 30 of their brief nine examples of restitution orders that would not otherwise be discharged, such as restitution arising from the crimes of reckless manslaughter, criminally negligent homicide, reckless assault with a deadly weapon, reckless burning, bribery, receiving kickbacks, cruelty to animals and professional gambling. Depending upon the underlying facts in these cases, these restitution claims may well be nondischargeable as arising from false pretenses, false representations, fraud, defalcation, embezzlement, larceny or willful and malicious injury by the debtor to the person or property of another. See Code §§ 523(a)(2), (4) and (6). See also *Spilman v. Harley*, 656 F.2d 244 (6th Cir. 1981) (creditor was entitled in bankruptcy court to attempt to prove willful and malicious injuries caused by debtor's conduct, even though state court judgment did not find willful and wanton misconduct, provided elements of willful and wanton misconduct were not necessary to the state court action).

To the extent that there are a few restitution orders that are ultimately dischargeable in bankruptcy it simply means that the policies and priorities established by Congress through the Bankruptcy Code shall prevail; this results from the impact of the Supremacy Clause. See *Perez v. Campbell*, 402 U.S. 637, 649-652 (1971). One illustration of this point is provided by the fact situation presented in the case of *In re Cornell*, 44 B.R. 528 (Bankr. Conn. 1985). There, the debtor, after being involved in a motor vehicle accident, was convicted of operating a motor vehicle without insurance and ordered to pay restitution

to the other party for the damage to their automobile. The bankruptcy judge ruled that the restitution order for damage to the motor vehicle was not discharged because criminal restitution is not a debt, and if it were, it is excepted from discharge under § 523(a)(7). This kind of claim arising from property damage to an automobile clearly would be discharged in bankruptcy but for the special status given to it by the bankruptcy judge as a criminal restitution order.

The fact situation in *Cornell* is strikingly similar to the fact situation in the *Perez* case.[13] By using a criminal restitution order a state may circumvent the impact of the *Perez* holding and the impact of the Bankruptcy Code discharge provisions. The Supremacy Clause is not that fragile It is the effect of the state law upon the full effectiveness of the federal law that is controlling, and not the labels or procedures that the state may employ. As this Court noted: "As early as *Gibbons v. Ogden,* 9 Wheat.1 (1824), Chief Justice Marshall stated the governing principle — that 'acts of the State Legislatures . . . [which] *interfere with,* or are contrary to the Laws of Congress, made in pursuance of the constitution', are invalid under the Supremacy Clause." *Perez v. Campbell,* 402 U.S. 637, 649 (1971) (emphasis in original).

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[13] In *Perez,* the debtor, while operating a motor vehicle without insurance, had been involved in an accident, and a judgment had been entered against him for injuries and damage sustained in the accident. Although the judgment was discharged in bankruptcy, the state, under its motor vehicle safety responsibility law, continued to suspend the debtor's license and registration until the judgment was paid in full. This Court held the state law constitutionally invalid as violative of the Supremacy Clause. *Perez v. Campbell,* 402 U.S. 637 (1971).

CONCLUSION

For the foregoing reasons and for the reasons stated in the Second Circuit's opinion, this Court should uphold the judgment and decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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No. 85-1033

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

JOHN J. KELLY,
CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL.,
Petitioners,

v.

CAROLYN ROBINSON,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF THE PETITIONERS

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ARGUMENT

I. IN ENACTING THE BANKRUPTCY CODE CONGRESS MADE NO ATTEMPT TO ALTER THE PREVAILING VIEW UNDER THE BANKRUPTCY ACT THAT CRIMINAL SANCTIONS WERE NOT DEBTS.

The State petitioners have argued that, by the time of the passage of the Bankruptcy Code in 1978, the courts had carved from the concept of bankruptcy debt an exception for criminal sanctions and that, since Congress in 1978 did not specifically alter this exception, this Court should presume that it sought to maintain it. Petitioner's Brief (Pet. Br.) at 19–25 (citing *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755, 759–60 (1986)). Respondent Robinson makes a two-step reply: 1) the basis of the 1898 Bankruptcy Act decisions was that criminal monetary obligations such as restitution were not "allowable" or "provable" debts under § 57d and § 63a, *see* 11 U.S.C. § 57d and § 103a (repealed 1979); note 2 *infra;* App. to Pet. Br. at 4A, and 2) because Congress eliminated the concepts of allowability and provability when it adopted the Code, Congress must have intended to include criminal monetary obligations within the Code definition of "debt." Respondent's Brief (Resp. Br.) at 17–20. These responses are simply not correct.

1. The Bankruptcy Act decisions in question do not depend upon the description of criminal monetary obligations as nonallowable or nonprovable debts. Of the six decisions that the petitioners quoted in their brief for the proposition that criminal sanctions were not Bankruptcy Act "debts,"

Robinson supplies her own quotations from only four. Resp. Br. at 18-19.[1] In two of these cases Robinson relies on language from lower court decisions contained within the principal opinion but not adopted by the principal court. Thus Robinson quotes the bankruptcy referee's opinion in *In re Moore*, 111 F. 145 (W.D. Ky. 1901), in an attempt to establish that criminal monetary obligations were not provable, *id.* at 148, but overlooks the reasoning of the district court, which had stated that "[t]he provisions of the bankrupt act have reference alone to civil liabilities, as demands between debtor and creditors, as such, and not to punishment inflicted pro bono publico for crimes committed." *Id.* at 150; Resp. Br. at 18. Similarly, Robinson refers to a summary of the rationale of the appellate department of the superior court in *People v. Washburn*, 97 Cal. App. 3d 621, 158 Cal. Rptr. 822, 824 (1979), but does not focus on the rationale of the Court of Appeals, which observed that "[a] condition of restitution . . . does not create a debt nor a debtor/creditor relationship between the persons making and receiving restitution." 158 Cal. Rptr. at 825; Resp. Br. at 19.

In the other two cases addressed by Robinson, the references to the concept of provability or allowability are fleeting and insubstantial. Robinson notes the phrase "provable debt" in the following quote, thus ignoring the true purpose of the paragraph, which was to establish that criminal fines were not "debts" of any sort:

> It is no doubt true that a fine imposed for a criminal contempt is not a "debt" within the meaning of § 1(14) of the Bankruptcy Act, 52 Stat. 841, 11 U.S.C.A. § 1(14). *See In re Moore*, D.C.W.D. Ky. 1901, 111 F. 145. Being not a provable debt, liability

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[1] Robinson attemps to explain one of the other two, *Zwick v. Freeman*, 373 F.2d 110, 116 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967), on the ground that it relied on cases discussed above that supposedly considered criminal sanctions not "provable." Resp. Br. at 18-19. Robinson does not address *People v. Mosesson*, 78 Misc. 2d 217, 356 N.Y.S.2d 483, 484-85 (Sup. Ct. 1974), in which the court stated that "[a] discharge has no effect whatsoever upon a condition of restitution in a criminal sentence."

> for such a criminal fine is not affected by a discharge in bankruptcy, § 17, 11 U.S.C.A. § 35. It was not in the contemplation of Congress that the federal bankruptcy power should be employed to pardon a bankrupt from the consequences of a criminal offense, whether the criminal contempt be against the authority of a state or federal court.

Parker v. United States, 153 F.2d 66, 71 (1st Cir. 1946); Resp. Br. at 18. Finally, the court in *In re Abramson*, 210 F. 878 (2d Cir. 1914), did state that "judgments for penalties are not debts which can be proved or allowed as such because they are not for a fixed liability," *id.* at 880, but the court did not make clear whether it had in mind civil or criminal penalties. The petitioners quoted in their original brief the passage "bankrupts who have violated laws passed for the public good cannot escape punishment by going into bankruptcy," *id.*, a passage which seems to refer more plainly to criminal cases.

The concepts of "allowability" and "provability" under the Bankruptcy Act referred to whether a debt was sufficiently liquidated, capable of estimation, or fixed in liability to allow a creditor to participate in the distribution of the estate. *See* 11 U.S.C. § 93d (Bankruptcy Act § 57d) (repealed 1979);[2] 11 U.S.C. § 103(a) (Bankruptcy Act § 63a) (repealed 1979); App. to Pet. at 4A. The passing references to criminal obligations not being "provable debts," upon which Robinson relies, provide scant indication that the courts considered fines and

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[2] Section 57d of the Bankruptcy Act provided:

> Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: *Provided, however,* That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act.

restitution too contingent or speculative to fit into a bankruptcy plan. *Cf. Manhattan Properties, Inc. v. Irving Trust Co.*, 291 U.S. 320, 338 (1934) ("There can be no provable debt in bankruptcy arising out of a contract which becomes effective only at the claimant's option and after the inception of the proceedings, the fulfillment of which is contingent on what may happen from month to month or up to the end of the original term."). Such a position would have made little sense, since courts have invariably imposed fines and restitution in amounts that are certain and definite. Rather, it is apparent that when the courts occasionally labeled criminal sanctions as not constituting "provable debts" or as not being "provable" they were using the term "provable" loosely as a shorthand for saying that monetary criminal obligations were simply not debts that were subject to bankruptcy.

2. The fact that Congress abolished the concepts of provability and allowability in 1978 had nothing to do with whether criminal monetary sanctions constituted debts. By eliminating provability and allowability, Congress sought to bring into bankruptcy those debts that were previously "too remote or contingent," H.R. Rep. No. 595, 95th Cong., 1st Sess. 309, *reprinted in* 1978 U.S. Code Cong. & Ad. News 6266, but Congress said nothing about changing the traditional nondebt status of those obligations, such as criminal sanctions, that were outside of bankruptcy for public policy reasons unrelated to remoteness or unprovability. As mentioned in the original brief, the only expression of Congress in the legislative history on this point was its statement that "the bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension," H.R. Rep. No. 595, *supra*, at 342, *reprinted in* 1978 U.S. Code Cong. & Ad. News 6299 — a statement that hardly reveals Congressional intent to reverse a consistent line of cases holding that criminal monetary sanctions were not debts. Since Congress did not even suggest that it intended the Code to change the judicially created criminal law exception to the concept of bankruptcy debts, this Court should presume that Congress sought to maintain it.

Midlantic National Bank v. New Jersey Department of Environmental Protection, supra. See also Brief of National Governor's Association, et al., as Amici Curiae in Support of Petitioners, at 11-12.

II. THE PROCESS OF OBJECTING TO DISCHARGE DOES NOT PROVIDE A REMEDY THAT ADEQUATELY PROTECTS THE INTERESTS OF THE STATES IN THE ADMINISTRATION OF CRIMINAL JUSTICE.

Robinson asserts that Congress did not intend to exclude criminal restitution orders from the bankruptcy process, particularly because some creditors have allegedly sought to transform the criminal process into a debt collection system. Instead of preserving the historic status of restitution as a nondebt, Congress, according to Robinson, intended state prosecutors — and perhaps crime victims — to file objections in federal bankruptcy court to the discharge of restitution. Robinson claims that this asserted remedy is straightforward and comprehensive. Resp. Br. at 22-23, 37-43.

These arguments contain fundamental contradictions. First, if Robinson means that debtors can challenge the good faith of the state prosecution when the state files objections to discharge, then the remedy of objecting to discharge would hardly be the simple procedure that Robinson claims it is. State prosecutors will then have to litigate the bona fides of state prosecutions in federal bankruptcy court. Such a procedure, as discussed in the petitioner's original brief, will impose hardships on crime victims, burden prosecutorial resources, require ordinarily impermissible inquiries into prosecutorial motives, erode the finality of criminal judgments, and contradict essential tenets of federal-state comity. Pet. Br. at 25-31. Surely Congress did not intend this result.

Second, Robinson has exaggerated the issue of creditor manipulation of the criminal justice system. "[T]he intentions of the complaining witnesses are not controlling in judging

the good faith of a criminal prosecution." *In re Davis*, 691 F.2d 176, 179 (3d Cir. 1982). State prosecutors represent societal interests broader than the injury to a particular victim. Robinson's interpretation of the Bankruptcy Code relies on the invalid assumption, unsupported by anything in the Code's legislative history, that Congress expected state prosecutors to misuse their governmental powers by initiating criminal charges solely on behalf of complaining creditors, rather than "on behalf of all the citizens of [the State.]" *Id.* at 178. Moreover, in many restitution cases—including this one—the state prosecution will have concluded before bankruptcy proceedings have even begun, thus dispelling all doubt as to whether the state prosecution sought to circumvent bankruptcy discharge.

Indeed, the cases Robinson cites involve state prosecutions pending at the same time as bankruptcy proceedings, *e.g.*, *In re Barnett*, 15 B.R. 504, 506 (Bankr. D. Kan. 1981), or arising after bankruptcy proceedings. *E.g.*, *In re Whitaker*, 16 B.R. 917, 919 (Bankr. M.D. Tenn. 1982). Resp. Br. at 37-39. In these cases, as noted in the petitioner's original brief, the accepted procedure for challenging the good faith of a state prosecution is to raise the issue in state court. Pet. Br. at 27 n.9. In the rare case in which state remedies are ineffective to prevent the harassment of a bankruptcy debtor, a bankruptcy court can enjoin the state court participants pursuant to 11 U.S.C. § 105(a). *Id;* Pet. at vi.[3]

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[3] The State petitioners emphasize that the type of bad faith or harassment necessary to justify the dismissal or enjoining of a state prosecution arises only in the limited circumstances when the state prosecutes "for the purpose of retaliating for or deterring the exercise of constitutionally protected rights." *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979) (construing *Younger v. Harris*, 401 U.S. 37 (1971)). A state prosecution designed to retaliate for or deter the exercise of federal bankruptcy rights implicates the Supremacy Clause of the Constitution, and thus meets this high threshold. *See McDonald v. Burrows*, 731 F.2d 294, 298-99 (5th Cir.), *cert. denied*, 105 S. Ct. 173 (1984); *In re Davis*, 691 F.2d 176, 178 (3d Cir. 1982).

Thus the occasional occurrence of creditor abuse of the criminal justice system does not logically provide a reason for Congress to have made restitution nondischargeable on a case-by-case basis. The issue is likely to arise only when a state criminal prosecution takes place at the same time of or after the defendant's bankruptcy proceedings, and, in those cases, the existence of state remedies and, if necessary, the injunctive powers of § 105(a) provide all the necessary relief. In other cases, as in this case, the issue of bad faith could only serve as a spurious defense to a state's objection to discharge, thus making objection to discharge proceedings exactly the type of burdensome relitigation of the criminal trial that Robinson claims they would not be. Robinson's theory that Congress intentionally discontinued the pre-Code nondebt status of criminal restitution simply does not withstand analysis.[4]

Finally, the process of objecting to discharge is not as comprehensive a remedy as Robinson intimates. Resp. Br. at 41–42. Robinson does not specifically reveal how restitution ordered for reckless and negligent crimes, or for bribery, kickbacks, or gambling would be excepted from discharge, and it is clear that they would not be. Pet. Br. at 30. Moreover, if the state has to prove that reckless crimes in reality involved willful and wanton misconduct, or that briberies and kickback schemes in actuality involved fraud or larceny, as Robinson suggests, then the process of filing exceptions to discharge would require burdensome retrials of otherwise final criminal judgments.

Robinson ultimately acknowledges that there may be some instances in which no applicable exceptions to discharge exist, but maintains that in these cases Congress intended the fresh start policies of the Bankruptcy Code to prevail over

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[4] Most of the cases of creditor bad faith that Robinson cites, moreover, arose under the new Code. Resp. Br. at 37–39 & n.10. These cases obviously would not have provided a basis for Congress to have changed the nondebt status of restitution when enacting the Code in 1978.

the interests of the criminal justice system. Resp. Br. at 42. Robinson thus apparently believes that in certain cases Congress intended that a criminal can escape the consequences of his crime by filing a petition for bankruptcy. Congress, however, made its intentions clear in stating that "[t]he bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial overextension. Thus criminal actions and proceedings may proceed in spite of bankruptcy." H.R. Rep. No. 595, *supra*.[5]

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[5] Robinson's reliance on *Perez v. Campbell*, 402 U.S. 637 (1971), is misplaced. Resp. Br. at 42–43. In *Perez* the state sought to penalize an automobile driver for failure to pay a discharged civil judgment. In the case at bar the question is whether the obligation—in this case a criminal judgment—constitutes a dischargeable debt to begin with. Only if this Court rules that it is such a debt will the *Perez* issue arise. Pet. Br. at 34 n.12.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petitioners' original brief, this Court should reverse the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted.

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NO. 85-1033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN J. KELLY, CONNECTICUT
CHIEF STATE'S ATTORNEY, ET AL.,

Petitioner,

V.

CAROLYN ROBINSON,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF AMICI CURIAE, ALASKA, CALIFORNIA, FLORIDA, IDAHO, ILLINOIS, INDIANA, IOWA, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, UTAH, VERMONT, WASHINGTON, WISCONSIN, AND WYOMING*

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NO. 85-1033

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

JOHN J. KELLY, CONNECTICUT
CHIEF STATE'S ATTORNEY, ET AL.,

Petitioner,

V.

CAROLYN ROBINSON,

Respondent.

BRIEF OF AMICI CURIAE, IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF AMICI CURIAE

Amici curiae are states, each of which uses different penal sanctions for different cases to enforce its criminal laws. Amici use sentences that include probation, with conditions tailored to the offense and offender. Amici's penal sanctions include, in many cases, requirements that offenders pay sums of money corresponding to victims' losses, as a condition of probation or through other judicial mechanisms.

The characterization of such a condition of probation in such a case as a "debt" dischargeable in bankruptcy is erroneous. It fails to recognize the important function that such sanctions serve in carrying out penal goals of deterrence, prevention, rehabilitation and proportional justice. Amici would be deprived of the flexibility to use the best available penal sanction to fit major categories of crimes, and would probably be forced into the use of sentences of incarceration when that sanction would otherwise be unnecessary, if the result in the court of appeals were to be considered correct.

STATEMENT OF THE CASE

Amici adopt the statement of the case made by Petitioner, the Chief State's Attorney for the State of Connecticut.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF SEVERAL OTHER COURTS OF APPEALS.

The Second Circuit's decision below conflicts with the holdings in *United States v. Carson*, 669 F.2d 216 (5th Cir. 1982), *United States v. Alexander*, 743 F.2d 472 (7th Cir. 1984), and *Barnette v. Evans*, 673 F.2d 1250 (11th Cir. 1982).[1]

This conflict is not a minor or tolerable one. In the States to which it is applicable, the decision below may frustrate victim restitution programs.[2] Furthermore, for reasons given in Part II of this Brief, the decision will have widespread results in other States.[3]

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1 The Second Circuit purported to distinguish these decisions on the ground that they assertedly involved non-dischargeable post-discharge debts. The assertion is inaccurate for the reasons given in Petition for Certiorari at pt. I. Further, none of these decisions admits of such a distinction; all reason that criminal restitution is simply not dischargeable under the Bankruptcy Act. *Id.*

Finally, the Second Circuit itself recognized the inconsistency. It flatly stated, "*We disagree with the reasoning and conclusions of* the [majority] line of cases." Slip op. at 9 (emphasis added).

2 The concurring opinion, below, states flatly that the decision will "stultify and render useless" such programs, Slip op. at 30, and called it an "unfortunate loophole." *Id.*

3 *See infra* notes 4-6 and accompanying text.

II. THE DECISION BELOW PRESENTS SUBSTANTIAL QUESTIONS OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

There have been a number of decisions concerning the issue raised by the case at bar. Virtually all are contrary to the court of appeals' decision in this case, although the court correctly cited one district court decision that supported its result.[4]

The effect of the decision below will be widespread and serious. It may leave victim restitution programs in many States in limbo. Judges who would otherwise use probation conditions as a substitute for incarceration will not know whether this sentence will be valid. That result would mean that the State could not use probation as an effective sanction to enforce its penal laws, and, therefore, many conscientious judges may be expected to use other sanctions instead, including incarceration.[5] Throughout the United States, effective and diligent attorneys will naturally respond to the decision by seeking discharge of conditions of probation, thereby creating conflicts between bankruptcy and criminal courts. Inconsistencies in result, from district to district and even from court to court, will be frequent. Since the inconsistencies will not reflect rationally cognizable differences in underlying cases, the penal law itself may be brought into disrepute. That state of affairs will continue until this Court resolves the issue.

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4 The court, below, correctly stated that "[a] majority of the courts that have considered this issue have . . . held . . . criminal restitution . . . not a debt . . . ." Slip op. at 9. The majority of cases follow *In re Pellegrino*, 42 B.R. 129 (Bankr. D. Conn. 1984), with which the lower court stated it disagreed. *Id.* It said, "The lone exception, so far as we are aware, is *In re Brown*, 39 B.R. 820 (Bankr. M.D. Tenn. 1984)." *Id.* at 12.

5 *See In re Pellegrino*, *supra* note 4, at 134.

A. There is a Substantial Question Whether the Condition of Probation at Issue in This Case, Which is a Penal Sanction Used by the State to Carry Out Its Policies of Deterrence, Incapacitation, Rehabilitation, and Proportional Justice, Was Correctly Characterized Below as a Mere Civil "Debt."

At one time, felonies were uniformly addressed by very severe penalties. That approach has given way, today, to more flexible sanctions. [6] Incarceration was used as an early substitute for capital punishment, and, later, probation upon specified conditions was used as an alternative to incarceration. All of these sanctions, however, share common characteristics. They are attempts by the State to carry out its policies of deterrence, prevention, rehabilitation, and proportional justice. [7]

Conditions of probation play an important part in the achievement of these policy goals. Probation for a less serious offense, for example, may carry few conditions other than standardized ones such as reporting and nonviolation of the law. Probation for more serious offenses, on the other hand, may incorporate requirements that force the probationer to confront and appreciate the effects of his criminal act. Thus probation may be conditioned upon a brief period of incarceration. Alternatively, it may be made a condition of probation that the offender perform a certain number of hours of community service. Requiring a drunk driver to assist in hospital emergency rooms, for example, may serve policies of general deterrence, specific deterrence, rehabilitation and proportional justice by forcing the offender to confront the consequences of his offense.

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6 *Cf. Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (recognizing a "variety of flexible techniques—probation, parole, work furloughs, to name a few"—that are available in non-capital cases). Probation with restitution conditions is a part of that flexible set of sanctions.

7 *See generally* S. KADISH, S. SCHULHOFER, & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES ch. 3 (4th ed. 1983).

1. In many cases, conditions of probation incorporating monetary payments are the superior means of accomplishing the State's penal purposes underlying the criminal law. The State's penal purposes may best be served, in many cases, by probation conditions requiring monetary payments to victims. Such a penal sanction works because it is a deterrent both general and specific; because it has rehabilitative effects; and because it communicates both to the victim and to the society at large that justice has been done. In fact, such victim payment conditions have been supported on the precise ground that they are highly effective in forcing the offender to confront, in the most tangible and measurable way, the harmful consequences of his offense.[8] As such, these conditions may be the best available penal sanctions in some kinds of cases.

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8 For an excellent discussion, see Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 932 (1984).

> [T]he criminal law's main goals are rehabilitation, deterrence, and retribution; consequently, criminal law focuses on punishing and reforming .... Although restitution may appear to share with the civil law the aim of compensation, close examination reveals that its principal goal is not its ability to make victims whole, but rather its utility as a corrective device.

Id. at 937.

Expert authorities express the view that only a minority of victims are benefitted directly by restitution. A condition requiring restitution depends upon apprehension, conviction and offender solvency; logically, therefore, restitution cannot be the basis of a systematic effort to compensate victims injured by persons who after all, more frequently are *not* apprehended. If general compensation is the goal, victim compensation programs of a quasi-insurance type can accomplish what restitution cannot. *See* Edelhertz, *Legal and Operational Issues in the Implementation of Restitution in the Criminal Justice System*, in RESTITUTION IN CRIMINAL JUSTICE 63-64 (J. Hudson & B. Galway eds. 1977).

Some experts therefore conclude, often in very definite terms, that a restitution program is actually likely to prove unsuccessful if viewed as having the goal of compensation, and that it will work best if viewed, instead, as effecting a penal sanction having as its goal the reform of the offender. For example, Edelhertz says:

The Court of Appeals gave no consideration to these penal purposes of the penal sanction at issue. Those penal purposes should be addressed by the grant of certiorari by this Court. Victim payment programs administered as conditions of probation are important penal sanctions and are worth saving. However, the concurring judge, below, was certainly correct when he stated that this decision will "stultify and render useless" such programs "*as a means of punishing persons convicted of felonies.*" [9]

2. The lower court confused the law by equating the equitable remedy of civil "restitution" with the entirely different criminal sanction of victim "restitution." The Court below erroneously reasoned that victim "restitution" payments required as a condition of probation by a criminal court are equivalent to, and a subclass of, equitable "restitution" remedies of the kind

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> [T]he [restitution] programs that are actually established invariably focus on correction or rehabilitation of offenders. *No restitution program has come to my attention that had the delivery of benefits to victims as a primary or even very important operational goal.*

Id. While amici curiae may retain differing views of the subject, and would certainly regard as beneficial those compensation effects actually resulting to victims, this conclusion of the expert authorities conflicts sharply with the statements of the court below and further demonstrates the substantial nature of the questions presented here.

The rehabilitative effects of restitution are borne out by empirical research. Challeen & Heinlen, *The Win-Onus Restitution Program*, in OFFENDER RESTITUTION IN THEORY AND ACTION 151, 155 (B. Galway & J. Hudson eds. 1978) (demonstrating lower recidivism rate for offenders who participated in restitution program). *See also* Note, *Victim Impact Statements and Restitution: Making the Punishment Fit the Victim*, 50 BROOKLYN L. REV. 301, 312-13 (1984).

9 Slip op. at 30 (emphasis added). The concurring judge's recognition that restitutive payments are not primarily compensatory, but rather are a "means of punishing persons convicted of felonies," supports the conclusion that they are a penal sanction rather than a debt.

that might be ordered by a civil court.[10] This reasoning was superficial and serves only to confuse the issues. There is in reality no relationship between equitable "restitution" and victim "restitution" as a penal sanction, except for the name.

Equitable restitution is a remedy distinguishable from compensatory damages, punitive damages, and specific performance, in that it influences the way in which a civil court may compute the civil measure of recovery upon which the plaintiff may levy execution. [11] Probation conditions are entirely different, may be measured in ways unrelated to equitable measures, may not provide for full payment of the victim's loss, may take into account the wage earnings of the offender, may involve a schedule tailored to his abilities, and, in short, may be tailored to serve the objectives of a criminal, penal sanction, rather than the rigidly defined individual remedy that a private creditor would have in a civil court in collecting a "debt." [12]

3. A penal sanction such as a prison term, community service, or a condition of probation requiring payment, may

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10 The court said, for example, that it saw no indication "that Congress intended some rights to restitution but not others to be within the definition of claim." Slip op. at 14. This reasoning fits civil restitution, in which there is a "claim," but it does not fit a judgment of probation, to which the victim is not a party and obviously does not present a "claim."

11 *Cf.* K. PARKER, MODERN JUDICIAL REMEDIES 12, 27-35 (1975).

12 In fact, Robinson was required to pay $100.00 per month. The total amount she would pay over the five-year probationary period was $5,800.00, and this amount would be considerably less than the $9,932.95 stolen by her. *See* Petition for Certiorari, Statement of the Case.

This flexible probation order is consistent with the use of the penal sanction. Conn. Gen. Stat. Ann. sec. 53a-30(a)(4) (West Supp. 1985) empowers the trial judge to take account of the offender's circumstances and ability "to pay" and gives him broad discretion in doing so.

informally be characterized as a "debt to society," but it is not thereby transformed into a debt dischargeable in bankruptcy. In its reasoning, the Court of Appeals considered only that authority under the Bankruptcy Act that requires the "broadest possible" interpretation of "debt," and the Court failed to consider that even a broad definition has limits at some point. For example, a person sentenced to a prison term is accurately (if informally) said to have a "debt" to society, but it would make no sense to regard that sentence of years in prison as a "debt" dischargeable in bankruptcy.

Similarly, community service might loosely be called a "debt to society." In the present case, for example, Carolyn Robinson might as appropriately have been sentenced to spend several hundred hours of community service to the benefit of public welfare recipients, and that obligation (in theory) could be made to be the precise equivalent, in effort and in effect, of the probation condition in the present case, yet it clearly would not be a "debt" for discharge purposes.[13] Likewise, some States would require a person in Robinson's position to pay a penalty into a common fund for general victim compensation; such a payment would be, metaphorically, a "debt" to society, but it would obviously not be a debt subject to bankruptcy discharge.[13a]

Each of these sentences would share, in common with the condition of probation at issue here, the characteristics of a

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13 Such a sentence, however, would be inferior, in many instances, to probation with a condition requiring restitution. For example, it often would interfere with the duties of the offender in keeping custody of his or her children.

13a Criminal restitution is "a constructive alternative to the severity of imprisonment and the leniency of probation." Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 932 (1984). "The sanction can take a variety of forms. A court may order an offender to pay money directly to the victim, to participate in a work program in which a portion of his salary is paid to the victim, to render services to the victim, or to work for the community in lieu of repayment of the victim." *Id.* at 933.

penal sanction, designed to further goals of deterrence, prevention, rehabilitation and proportional justice. The use of a simplistic definition of "debt," such as that used by the court below, would undermine the State's criminal justice system by precluding the use of what are not debts at all but penal sanctions. This result would be equally irrational in these examples and in the case at bar. [14]

Connecticut's primary goal in this case is not the collection of $9,932.95 as a civil "debt." Instead, Connecticut seeks to reduce theft in the future, by Carolyn Robinson and others, by vigorous prosecution followed by appropriate sanctions that carry out the State's policies of deterrence, prevention, rehabilitation, and justice. That result cannot follow if Robinson keeps the money she has stolen and has the sanction of the law in doing so. The $9,932.95 is a necessary but incidental consideration in

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14 The court of appeals suggested, erroneously, that the State could prevent this result by objecting to discharge.

That solution would require that the State reassign large numbers of assistant district attorneys to serve, instead, as bankruptcy lawyers. "Objecting" to discharge, and doing so effectively, is a complex procedure, equivalent to a civil suit. It requires a complaint; attendance at creditors' and various other pretrial meetings; discovery; a pretrial order; and, as in any other civil suit, proof by the objecting party of its grounds at a trial. It is possible that the State could be denied the benefits of offensive collateral estoppel, *see Haring v. Prosise*, 103 S.Ct. 2368 (1983), and therefore it could be faced with the requirement that it prove the elements of the crime all over again.

Furthermore, objecting to discharge would be ineffective if the offense did not fit the categories of crimes for which discharge can be prevented. For example a person who committed a reckless assault and caused severe personal injuries to another individual would be immune from objection and could avoid a sentence of restitution by bankruptcy.

Finally, the "objection" procedure assumes a need for case-by-case determination of the existence of the underlying crime. That effort is unnecessary, and Congress certainly would not have intended to require it, when the entire category of sentences sought to be discharged has already, by definition, been judicially determined to involve criminal offenses.

that larger purpose, for which Connecticut would undoubtedly be willing to spend much more than $9,932.95. The decision below presents substantial questions by its denigration of that larger purpose.

B. The Decision Below Presents Substantial Questions Concerning Whether the "Fresh Start" Policy of the Bankruptcy Act is Served by Forcing Connecticut into a Situation in Which It Has No Alternative But to Incarcerate the Bankrupt.

The basic policy of the Bankruptcy Act is to provide a "fresh start" to persons who have, through inadvertence, become overextended.[15] "The Bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial overextension."[16] The decision below will defeat that very policy of "fresh start" by forcing Connecticut and other States into harsher alternatives.

Connecticut simply cannot surrender its interest in deterrence, prevention, rehabilitation and proportional justice. Occasional miscarriages in individual cases, in which these goals may fail of achievement, might be tolerable; but systematic failures, in which major categories of offenders achieve virtually complete immunity from any penalties whatever upon conviction, are not. Thus the question raised by the decision below, and it is a substantial one, is: What is Connecticut to do in the cases of future Carolyn Robinsons?

If deprived of the ability to use conditions of probation to achieve its valid penal objectives, the State of Connecticut may be forced into a situation in which it has no alternative but to

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15 *Perez v. Campbell*, 402 U.S. 637 (1971) (expressing fresh start doctrine); *see also* 3 L. KING, COLLIER ON BANKRUPTCY para. 525.02 (15th ed. 1985).

16 *In re Pellegrino*, *supra* note 4, at 134.

incarcerate persons in Carolyn Robinson's position. The resulting deprivation of freedom may be more harsh for her and may require the State to make arrangements for her dependents that will be inferior to allowing her to keep them while on probation. In addition, the alternatives may be less appropriate to the achievement of the State's legitimate penal objectives than probation with appropriate conditions. Nevertheless, the State's interest in the integrity of its penal sanction is so fundamental that it will be forced to use more harsh, and less useful, alternatives if deprived of the middle ground by decisions such as that of the court below.[17] This result is inconsistent with the "fresh start" policy underlying the bankruptcy act.

CONCLUSION

The decision below conflicts with the approach taken in decisions of other courts of appeals. It presents substantial questions that have not been, but should be, decided by this court. The writ of certiorari should be granted.

Respectfully submitted,

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17 The holding below transforms what Respondent has done into the perfect crime. Connecticut clearly cannot afford to foster an atmosphere in which welfare theft, followed by conviction coupled with bankruptcy discharge, is perceived as the perfect crime. It will have no choice, if that happens, but to resort to the more severe and less appropriate sanction of imprisonment.

Supreme Court, U.S.
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No. 85-1033

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

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CONNECTICUT CHIEF STATE'S ATTORNEY, *et al.*
Petitioners,
v.
CAROLYN ROBINSON
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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31pp

QUESTIONS PRESENTED

1. Is a criminal restitution order imposed as a condition of probation a "debt" within the meaning of the Bankruptcy Code?

2. In any event, is a criminal restitution order a "penalty" exempt from discharge under the Bankruptcy Code?

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Pursuant to Rule 36 of the Rules of this Court, *amici* respectfully move for leave to file the appended brief

amici curiae in support of petitioners. Petitioners have consented to the filing of this brief. The motion is made necessary by the refusal of respondent to consent to the filing of the brief.

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. The case now before the Court raises an issue of grave concern to *amici*. The Court of Appeals for the Second Circuit ruled that a discharge under the federal Bankruptcy Code automatically nullifies a state court's criminal sentence requiring restitution as a condition of probation. This decision flies in the face of this Court's longstanding policy, based on principles of federalism and comity, against federal court interference with state criminal prosecutions. The decision below also ignores the established principle that federal bankruptcy laws are designed to relieve honest debtors of their civil obligations, not to impede the authority of the States to enforce criminal laws.

As a practical matter, this ruling, unless reversed by this Court, will discourage state courts from utilizing restitution orders in criminal sentencing, and thus eliminate a form of punishment that state legislatures and courts have determined is the most appropriate for many crimes. The ruling may require state courts to rely more heavily on incarceration to punish criminal defendants. As a result, this decision may place added burdens on the States' already taxed prison systems.

Amici submit that the ruling below is erroneous. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.

Respectfully submitted,

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

STATEMENT

The respondent pleaded guilty in Connecticut Superior Court to the crime of larceny. This criminal conviction was based on the unlawful receipt of some $9,000 in public assistance benefits from the Connecticut Department of Income Maintenance while simultaneously receiving social security benefits. The court sentenced her to a prison term of one to three years, execution of which was suspended, and to a term of probation for five years on the condition that she make monthly restitution payments of $100 to the State. Respondent subsequently filed a bankruptcy petition and obtained a discharge of her "debts" under Chapter 7 of the federal Bankruptcy Code ("the Code").

After receiving her discharge, respondent informed the State of Connecticut of her belief that the discharge excused her from any obligation to comply with the terms of her probation, and she ceased making restitution payments. When the State informed respondent that it expected her to comply with the criminal sentence, she initiated this proceeding in the bankruptcy court seeking, among other things, a declaration that the restitution obligation had been discharged, and an injunction prohibiting the State from taking any steps, including revocation of probation, to obtain further restitution.

The bankruptcy court denied relief. The court held that a restitution order imposed as a condition of bankruptcy does not constitute a "debt" within the meaning of section 101(11) of the Code and, even if it were a debt, such a debt would be a "penalty" exempt from discharge under section 523(a)(7) of the Code. The district court adopted those conclusions.

The Court of Appeals for the Second Circuit reversed. First, the court held that the language of the Code is "sufficiently broad" to capture a criminal restitution order within the term "debt." Appendix to Petition for *Certiorari* (hereafter "Pet. App.") 37A. Second, the

Court held that a criminal restitution order is not exempt from discharge as a "penalty" because this sanction has "compensation for actual pecuniary loss as at least one of its purposes." Pet. App. 52A. Finally, viewing respondent's motion for an injunction as a request for "clarification and particularization" of the injunction already in effect under Code section 524, the court remanded for entry of "an order enjoining defendants from taking *any* steps to recover further restitution payments." Pet. App. 54A (emphasis added). In a reluctant concurring opinion, Judge Mansfield characterized the result as "unfortunate" because it will "stultify and render useless criminal restitution payments as a means of punishing persons convicted of felonies involving theft or fraudulent procurement of money or property." Pet. App. 55A.

SUMMARY OF ARGUMENT

1. It is established federal policy that federal courts should avoid interfering with state criminal prosecutions, and Congress expressly incorporated that policy in the federal Bankruptcy Code. In blatant violation of that policy, the ruling by the court below authorizes federal bankruptcy courts to nullify monetary sanctions imposed as part of a state court's criminal sentence. The decision, unless reversed, would distort state criminal law enforcement and also may subvert the purpose of the Bankruptcy Code.

2. It is also established federal policy that the bankruptcy laws are not intended to interfere with state criminal prosecutions, and nothing in the legislative history of the Code indicates that Congress intended to alter that policy. A criminal restitution order imposed as a condition of probation does not create a debt within the meaning of the Bankruptcy Code because such an order does not create a "right" to payment. Furthermore, although a criminal restitution order may have an incidental compensatory effect, a restitution order

does not create a debt because the purposes of criminal restitution are deterrence, retribution, and rehabilitation.

3. Even if a criminal restitution order did create a "debt," that debt would be a "penalty" exempt from discharge under the Code. The essential purpose of any term of a criminal sentence, even if it orders the payment of money, is punishment, not compensation.

ARGUMENT

I. A FEDERAL BANKRUPTCY COURT'S DISCHARGE OF A STATE COURT'S RESTITUTION ORDER IMPOSED AS A CONDITION OF PROBATION AFTER CRIMINAL CONVICTION INTRUDES EXCESSIVELY UPON STATE CRIMINAL LAW ENFORCEMENT.

This Court has repeatedly emphasized that the federal courts should avoid interfering with the States' front-line responsibility for enforcing criminal laws. The court below disregarded this important feature of "Our Federalism" in holding that a discharge in bankruptcy automatically nullifies a criminal sentence requiring a convicted criminal to make restitution as a condition of probation.

As the Court stated in *Younger v. Harris*, 401 U.S. 37, 43 (1971), this Nation has a "longstanding public policy against federal court interference with state court proceedings." This policy applies with special force to state criminal proceedings, because "[t]he States possess primary authority for defining and enforcing the criminal law," and "[f]ederal intrusions into state criminal trials frustrate . . . the States' sovereign power to punish offenders . . . ." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). As the Court explained in *Younger* (401 U.S. at 44), the policy of deference to state criminal proceedings is based on the "vital consideration" of "comity"—

> that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a

> continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

The duty to avoid interfering with state criminal proceedings is equally binding on federal courts exercising bankruptcy jurisdiction. *See Barnette v. Evans*, 673 F.2d 1250, 1251-52 (11th Cir. 1982). Congress explicitly incorporated the federal policy of deference to state criminal proceedings in the 1978 Bankruptcy Code. As Congress recognized: "The bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension. Thus, criminal actions and proceedings may proceed in spite of bankruptcy." H.R. Rep. No. 595, 95th Cong., 1st Sess. 342, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6299. *See also* 11 U.S.C. § 362(b)(1). This policy applies *a fortiori* in proceedings presided over by bankruptcy judges, because they do not exercise the judicial power of the United States under Article III of the Constitution. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and P.L. 98-353, the Bankruptcy Reform and Judgeship Act of 1984. Federal bankruptcy judges should have even less authority than Article III federal courts to interfere with state criminal proceedings.

It is indisputable that the decision of the court below substantially intrudes upon the criminal law enforcement responsibility of the State of Connecticut. The ruling completely excuses the convicted offender from any further obligation to make restitution payments. Thus, the ruling destroys the "reforming discipline" that the superior court's sentence of probation was intended to place on the offender. *Korematsu v. United States*, 319 U.S. 432, 435 (1943).

Beyond that, however, it appears that the ruling below effectively disables the State from enforcing any criminal sanction on this offender. Section 524 of the Code states

that a discharge in bankruptcy "operates as an injunction against . . . *any* act . . . to collect . . . any [discharged] debt." (Emphasis added.) *See also* H.R. Rep. No. 595, *supra*, at 80, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 6321-22 (section 524 "is intended to insure that once a debt is discharged the debtor will not be pressured in any way to repay it"). Relying on this provision, respondent sought and obtained from the court of appeals a remand for entry of an injunction that would effectively bar the State from seeking to revoke respondent's probation and from requesting alternative punishment, including incarceration. *See* Pet. App. 54A; *see also* 11 U.S.C. § 525, Brief of Petitioners, n.12. Thus, unless reversed, that decision will allow this offender to escape all responsibility for her crime, and it will frustrate the State's vital interest in effectively enforcing its criminal laws.

This result is utterly unreasonable. The bankruptcy court could not have collaterally reviewed and discharged the offender's criminal sentence if the State had insisted on a term of incarceration in the first instance. As another bankruptcy court has observed, "[t]he result should not be different merely because the state chose a less restrictive means to further its penal goals." *In re Vik*, 45 B.R. 64, 68 (Bkrtcy. N.D. Iowa 1984).

The States must have the authority to impose sanctions for crime. These sanctions must be effective enough to punish criminals and deter potential law-breakers. Acceptance of the ruling below, however, would severely limit the options available to the State of Connecticut and to other States for punishing crime. Under that ruling, a large number of convicted criminals could launch collateral attacks on their criminal sentences by invoking the federal bankruptcy laws.

Thus, the decision below would distort state criminal enforcement in several ways. In order to ensure that their criminal laws have any teeth at all, the States may be forced to incarcerate more criminals instead of relying

on probation, even where probation would otherwise be an appropriate sanction. This pressure would deprive the States of the sentencing option that their legislatures and courts have determined is most appropriate for many crimes. It also would subject offenders to sentences that are needlessly harsh and less appropriate for their crimes. Moreover, heavier reliance on incarceration would impose yet greater burdens on the already over-taxed state prison systems. *See* U.S. Department of Justice, *Bureau of Justice Statistics Annual Report Fiscal 1985*, 35 (April, 1986).

Ironically, by diminishing the value of restitution orders as a criminal sanction, the ruling below may actually subvert the goals of the federal bankruptcy laws. The purpose of the Code is to relieve persons who are being crushed by their debts and to provide them a "fresh start" in life. *See Perez v. Campbell*, 402 U.S. 637 (1971). If the States were forced to jail impecunious criminals because they could nullify probation simply by filing for bankruptcy, those offenders would have less of an opportunity to obtain the "fresh start" that the Code is intended to provide.

In sum, the decision below constitutes a severe intrusion on the States' power to punish criminal offenders and subjects the state courts' criminal sentencing decisions to nullification by federal bankruptcy judges. Because crucial principles of federalism and comity are at stake, this Court should sustain the decision only if the language of the Code and congressional intent clearly compelled that result. In construing the Code, the Court should presume that Congress did not intend to preempt state authority. In fact, as we shall explain, it is clear that Congress did not intend to make a restitution order imposed as a condition of probation a debt dischargeable in bankruptcy.

II. CONGRESS DID NOT INTEND A DISCHARGE UNDER THE BANKRUPTCY CODE TO NULLIFY STATE CRIMINAL PROCEEDINGS AND JUDGMENTS.

A. A Criminal Restitution Order Imposed As A Condition Of Probation Is Not A "Debt" Within The Meaning Of The Bankruptcy Code.

Section 727(b) of the Bankruptcy Code authorizes bankruptcy courts to discharge an applicant's "debts." Section 101(11) defines a "debt" as a "liability on a claim." Section 101(4)(A) defines a "claim" as a

> *right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(Emphasis added.) Thus, the essential feature of a dischargeable debt is that someone has (or may have) a "right to payment" from the person who is applying for a discharge of his debts.

The holding by the court below that a criminal restitution order creates a "right to payment" is contrary to the established principle that a discharge in bankruptcy does not permit a debtor to avoid a criminal sentence. First, as the court of appeals itself recognized (Pet. App. 36A-37A), its construction of the term "right to payment" flies in the face of a long line of bankruptcy court decisions reaching a virtual consensus that a criminal restitution order does not create a "right to payment" or a "debt" within the meaning of the Code. *See, e.g., In re Oslager*, 46 B.R. 58 (Bkrtcy. M.D. Pa. 1985); *In re Vik, supra; In re Pellegrino*, 42 B.R. 129 (Bkrtcy. D. Conn. 1984); *In re Button*, 8 B.R. 692 (Bkrtcy. W.D. N.Y. 1981); *but see In re Brown*, 39 B.R. 820 (Bkrtcy. M.D. Tenn. 1984). In addition, the court's construction conflicts with the rule adopted in at least three other circuits that a discharge in bankruptcy does not bar an order in a subsequent criminal proceeding re-

quiring the debtor to make restitution to a victim whose civil debt has been discharged. *See United States v. Alexander*, 743 F.2d 472 (7th Cir. 1984); *United States v. Carson*, 669 F.2d 216 (5th Cir. 1982); *see also Barnette v. Evans*, *supra* (adopting holding in *Carson*). The court's attempt to distinguish those cases rested on a mistaken view of when dischargeable claims arise.[1]

These decisions interpreting the Code are consistent with the rule under the prior Bankruptcy Act that monetary penalties imposed in criminal proceedings, including restitution orders, did not create "debts." Indeed, so far as we are aware, every court that addressed the question under the Bankruptcy Act clearly and unequivocally held that a restitution obligation imposed as a condition of probation was not a "debt." *See People v. Washburn*, 158 Cal. Rptr. 822, 825 (Cal. Ct. App. 1979) ("the Bankruptcy Act does not contemplate . . . that its provisions would apply to orders for restitution as conditions of probation"); *People v. Mosesson*, 356 N.Y.S.2d 483 (N.Y. Sup. Ct. 1974) ("A condition of restitution in a sentence of probation is a part of the judgment of conviction. It does not create a debt or a debtor/creditor

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[1] The court erroneously assumed that a "debt" based on a restitution order would not arise until the order was entered. Contrary to the court's assumption, however, a debt "arises" for bankruptcy purposes when the *claim* arises under state law, not when judgment is entered on the claim. *See, e.g., In the Matter of M. Frenville Co.*, 744 F.2d 332, 337 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 911 (1985); *In re UNR Industries*, 29 B.R. 741, 745 (N.D. Ill. 1983), *appeal dismissed*, 725 F.2d 1111 (7th Cir. 1984).

Because the States' right to prosecute the crimes and thus to *seek* restitution in those cases "arose" prior to the bankruptcy proceedings, the debtors' obligations under the restitution orders would have been dischargeable if liability for criminal restitution were a "debt" within the meaning of the Code. Thus, the holdings in those circuits that a discharge in bankruptcy does not bar entry of a restitution order in a subsequent criminal proceeding necessarily rests on the principle that criminal liability for restitution is not a "debt."

relationship between the persons making and receiving restitution."); *see also People ex rel. Auerbach v. Topping Bros.*, 359 N.Y.S.2d 985 (N.Y. Crim. Ct. 1974) (following *Mosesson*). Furthermore, those Bankruptcy Act decisions explicitly recognized that this rule achieves a proper balance between the purposes of the federal bankruptcy laws and the goals of the criminal law:

> The purpose of our bankruptcy laws is humane in nature. They set forth the policy of our government to aid individuals from being totally crushed under a mountain of debt. They are not, however, the last refuge of a thief seeking a loophole to avoid criminal responsibility.

People v. Mosesson, supra, 356 N.Y.S.2d at 584; *see also People v. Washburn, supra*, 158 Cal. Rptr. at 825.

Those decisions reflected the general rule under the Bankruptcy Act that monetary sanctions in criminal proceedings were not "debts." *See Spalding v. New York ex rel. Backus*, 45 U.S. 21 (1845); *Parker v. United States*, 153 F.2d 66 (1st Cir. 1946); *In re Moore*, 111 F. 145 (W.D. Ky. 1901); *but see In re Alderson*, 98 F. 588 (D. W.Va. 1899). *See generally* 3A *Collier on Bankruptcy* ¶ 63.12, at 1836 (14th ed. 1975) ("It is almost generally accepted that the liability for a fine or penalty is not dischargeable, if for no other reason than the imperative necessity of enforcing criminal sanctions established for the public welfare.")

Although the court of appeals believed that both the pre-Code law and the legislative history of the Code supported its construction of the term "debt," its analysis was seriously flawed. First, based on its reading of sections 57 and 63 of the Bankruptcy Act, *see* 11 U.S.C. §§ 93 and 103a (1976) (repealed), the court concluded that a restitution order imposed as a condition of probation fell within the definition of a "provable" claim, and hence was a dischargeable debt. *See* 11 U.S.C. § 35 (1976) (repealed). *See* Pet. App. 41A. The court, however, simply

overlooked the threshold question whether a restitution order was a "debt" within the meaning of the Act, *see* 11 U.S.C. § 1(14) (1976) (repealed). As we have just explained, the courts had uniformly rejected such an assumption.

Second, contrary to the court of appeals' view, the legislative history relating to the Code definition of "claim" provides no evidence that Congress intended to expand the scope of dischargeable debts to include monetary sanctions imposed in criminal proceedings. Under the Bankruptcy Act, "contingent" or "unliquidated" claims whose estimation or liquidation might be time-consuming were not "allowable" at all in the bankruptcy case and, therefore, were not affected by the discharge. *See* 11 U.S.C. § 93d (1976) (repealed); 3A *Collier on Bankruptcy* ¶ 63.30, at 1912 (14th ed. 1975). The legislative history of the Code demonstrates that the Code's broader definition of "claim" was designed to ensure that the bankruptcy courts would deal with contingent and unliquidated claims in the bankruptcy case.

> [U]nder the liquidation chapters of the Bankruptcy Act, certain creditors are not permitted to share in the estate because of the non-provable nature of their claims, and the debtor is not discharged from those claims. Thus, relief for the debtor is incomplete, and those creditors are not given an opportunity to collect in the case on their claims. The proposed law will permit a complete settlement of the affairs of a bankrupt debtor, and a complete discharge and fresh start.

H.R. Rep. No. 595, *supra*, at 180, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 6141; *see also id.* at 309, *reprinted in* U.S. Code Cong. & Ad. News at 6266 (the broader definition of "claim" in the Code "contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case"); 11 U.S.C. § 502(c) (new provision providing for mandatory estimation of "any contingent or unliquidated claim").

Because criminal restitution orders were not "debts" at all under the Bankruptcy Act, their nondischargeable status did not turn on whether they were "contingent" or "unliquidated." Accordingly, Congress's desire to eliminate technical obstacles to the allowance of claims does not support the notion that Congress implicitly extended the Code definition of "claims" to include criminal restitution orders imposed as a condition of probation.

In sum, nothing in the legislative history of the Code suggests that Congress intended to reject the established policy under the Bankruptcy Act that discharge in bankruptcy does not interfere with a criminal sentence. Thus, contrary to the view of the court of appeals, the most reasonable conclusion is that Congress intended to preserve this rule when it adopted the Code. *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *see also Midlantic National Bank v. New Jersey Department of Environmental Protection*, —— U.S. ——, 106 S.Ct. 755 (1986).

Furthermore, the court of appeals was wrong in concluding that the term "right to payment" can be stretched to include a criminal restitution order. The restitution order in this case did not create a "right to payment" because the State simply had no "right" to obtain money from the offender when she chose not to pay. In general, a sentence of probation gives a criminal the right to "elect" either to comply with the terms of her probation or to risk revocation of the probation. *Cf. United States v. Alexander, supra*, 743 F.2d at 479, *quoting United States v. Mitsubishi International Corp.*, 677 F.2d 785, 788 (9th Cir. 1982) (citing cases).

The offender in this case had a right of election under Connecticut law. Neither the Connecticut Department of Income Maintenance, the victim in this case, nor the Connecticut Office of Adult Probation, has a legal right to collect the restitutionary payments. Perhaps the Probation Office could try to convince the offender to pay by, for example, initiating an action to revoke probation

or to modify its terms. But, in contrast to a liability arising in contract or tort, which does create a "right to payment," the Probation Office could not obtain a court order directly requiring the offender to pay, much less employ process to seize the offender's property to secure payment. Pet. App. 46A-47A.[2]

The conclusion that a restitution order like the one in this case does not create a "right to payment" is confirmed by comparing the criminal sentence here with the debtor's unconditional "obligation" to pay money in *Ohio v. Kovacs*, —— U.S. ——, 105 S.Ct. 705 (1985). In holding that there was a "right to payment" within the meaning of the Code in *Kovacs*, this Court explained the standards for making that determination. Despite the obvious importance of *Kovacs* to the proper resolution of this case, however, the court below completely ignored those standards.

In *Kovacs*, a state court had entered a stipulated judgment requiring Kovacs to clean up a toxic waste site. After he failed to comply with the judgment, the State obtained appointment of a receiver to take control of all of Kovacs' property, and initiated proceedings to require that part of Kovacs' post-bankruptcy income be applied to the unfinished cleanup task. This Court held that Kovacs' obligations under the original injunction had been "converted" into a "right to payment" under Code section 101(4)(B). As the Court explained, appointment of the receiver "disabled" Kovacs from carrying out the cleanup himself, and "the *only* performance sought from Kovacs was the payment of money." *Id.* at 710 (emphasis added). Moreover, as the Court expressly

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[2] The court of appeals acknowledged that the victim in this case, the defrauded state agency, has no "right to payment." Pet. App. 36A-37A. This conclusion was unavoidable because, under Connecticut law, the victim has no right to determine the amount of restitution, no right to testify, no right of appeal, and no right to enforce payment. *See In re Pellegrino*, 42 B.R. 129, 132 (Bkrtcy. D. Conn. 1984).

noted, if Kovacs had failed to pay for the cleanup (and if he had not obtained bankruptcy protection), the State would have had the right to seize Kovacs' property to satisfy the obligation. *Id.* at 709 n.9. Because the State had a right to payment, the Court held that Kovacs' obligation was a dischargeable "debt."

The dischargeable "debt" in *Kovacs* differs critically from the restitution order in this case. In contrast to Ohio's unconditional right to collect money from Kovacs after the receiver was appointed, Connecticut simply had no legal "right to payment" when the offender here elected not to pay. Although Ohio was entitled to seize Kovacs' property to satisfy the "debt," Connecticut had no right to seize the debtor's property to enforce the restitution order. The court of appeals dismissed as irrelevant the fact that Connecticut cannot seize an offender's property to enforce this kind of condition of probation, stating that "[t]he right is not the less cognizable because the obligor must suffer loss of freedom rather than loss of property upon failure to pay." Pet. App. 47A. In fact, that distinction is fundamental to the concept of a "debt" under the Bankruptcy Code. The core of the federal bankruptcy process is the equitable and orderly resolution of claims against the debtor's *property*. By contrast, deprivations of "freedom" upon conviction for crimes are outside the scope of the federal bankruptcy laws.

Finally, a criminal restitution order is not a "debt" because the essential purpose of this sanction is to punish the criminal, not to pay the victim. When it is part of a criminal sentence, particularly a sentence of probation, restitution serves all the traditional purposes of punishment—deterrence, retribution, and rehabilitation. *United States v. Brown*, 744 F.2d 905, 909 (2d Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 599 (1984).

It is an obvious *deterrent;* it takes the profit out of crime by making the criminal disgorge any ill-gotten gains.

Courts also have recognized the *retributive* nature of a criminal sentence requiring restitution. Although making the victim whole is a "usually laudable consequence" of a restitution order, *United States v. Carson*, *supra*, 669 F.2d at 217, that incidental effect does not alter the fact that the purpose of restitution is *punishment* of the criminal. "[T]he focus of any probation regimen is on the offender." *Ibid.* Thus, in *Spalding v. State of New York ex rel. Backus*, *supra*, this Court affirmed a New York court decision holding that a criminal fine is not dischargeable in bankruptcy, even though the New York statute under which the fine had been imposed provided that the victim could receive the fine as compensation for his losses. 45 U.S. at 24-25. As the New York court had explained, "the fine is no less a penalty for a criminal act, and intended as a punishment for the same, than if inflicted for the benefit of the people." *Id.* at 26. *See also Parker v. United States*, *supra*, 153 F.2d at 70-71 (penalty imposed in a criminal contempt proceeding is not a debt even though the court may "order the fine to be paid in whole or in part to some person injured by the contumacious act"). Indeed, restitution is a precisely tuned punishment, because the penalty fits the crime with a special congruence.

The courts also have emphasized restitution's unique value in *rehabilitation* when it is part of a sentence of probation. As this Court has explained, probation is "an individualized program offering a[n] . . . unhardened criminal offender an opportunity to rehabilitate himself without institutional confinement." *Roberts v. United States*, 320 U.S. 264, 272 (1943). *See also Korematsu v. United States*, 319 U.S. 432, 435 (1943) (probation is a "mild and ambulatory punishment . . . intended as a reforming discipline."); *United States v. Alexander*, *supra*, 743 F.2d at 480 ("Fundamental to the imposition of probation is the belief that its conditions will result in the rehabilitation of the probationer at no cost to the public safety.").

Although a probationary restitution order has a compensatory effect, as the court of appeals correctly observed, that effect is essential to achieve the sanction's rehabilitative purpose. It is surely an important component of rehabilitation for the offender to return the stolen money or property to the victim and thereby to acknowledge and correct his wrong in a tangible way. *See United States v. Alexander*, *supra*, 743 F.2d at 480 ("Although imposition of a fine may have the same *pecuniary effect* as restitution on the probationer, the *rehabilitative effect* may well be augmented by the act of making one's victims whole.") (emphases in original). *See also* Marcotte, "Restitution Pays," 72 A.B.A.J. 21 (May 1, 1986) (reporting study documenting rehabilitative effects of criminal restitution orders).

The Connecticut statutes authorizing restitution as part of a criminal sentence emphasize the rehabilitative value of restitution. For example, Conn. Gen. Stat. § 53a-30(a) lists restitution as one of eight alternative conditions that may be imposed in conjunction with a sentence of probation, including conditions relating to employment or education, medical treatment, and support for dependents. The rehabilitative purpose of these conditions, including restitution, is underscored by the final catch-all provision authorizing the court to order a defendant to "satisfy *any other* conditions reasonably *related to his rehabilitation.*" (Emphasis added.) The restitution statute itself directs the court to tailor the amount of restitution in order to fit the personal circumstances of the defendant, including his ability to pay. Conn. Gen. Stat. § 53a-30(a).

Thus, when placed in the context of a criminal conviction and sentence, a restitution order is not a "debt" within the meaning of the Bankruptcy Code.

B. In Any Event, A Criminal Restitution Order Imposed As A Condition Of Probation Would Constitute A "Penalty" Exempt From Discharge.

Even if a restitution order like the one imposed in this case created a "debt," it would be exempt from discharge.

The Code provides that a discharge in bankruptcy does not discharge a debtor from any debt

> to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty . . . .

11 U.S.C. § 523(a)(7). The court of appeals acknowledged that the restitution order here constituted a "penalty" and was obviously for the benefit of a governmental unit. The court, however, also held that the order represented compensation for "actual pecuniary loss" because "at least one of its purposes" was to compensate the State of Connecticut for the money that respondent had illegally obtained from the State. Pet. App. 50A-51A. That latter holding was wrong.

The essential purpose of *any* term of a criminal sentence, even if it orders the payment of money, is punishment and not compensation. Congress recognized the punitive character of criminal restitution when it provided that a federal court on sentencing a defendant convicted of a federal crime "may order, in addition to or in lieu of *any other penalty* authorized by law, that the defendant make restitution to any victim of the offense." 18 U.S.C. § 3579(a) (renumbered § 3663(a) eff. Nov. 1, 1986) (emphasis added). Therefore, even if a criminal sentence has a financial component and even if it is measured by the loss inflicted, the criminal sentence does not provide "compensation for actual pecuniary loss" within the meaning of Code section 523(a)(7). *See In the Matter of Zarzynski*, 771 F.2d 304 (7th Cir. 1985) (obligation to pay costs of criminal prosecution not

"compensation for actual pecuniary loss" because obligation was imposed as punishment and not as compensation); *In re Cox*, 33 B.R. 657 (Bkrtcy. M.D. Ga. 1983) (same); *cf. In re Kovacs*, 9 C.B.C. 279, 282-83 (Bkrtcy. S.D. Ohio 1982), *aff'd*, 717 F.2d 984 (6th Cir. 1983), *aff'd*, —— U.S. ——, 105 S.Ct. 705 (1985) (distinguishing Kovacs' dischargeable obligation to pay compensation in a civil proceeding, which did constitute "compensation for actual pecuniary loss," from restitution order imposed as a condition of probation in a criminal proceeding).

This construction is entirely consistent with judicial interpretation of section 57j of the Bankruptcy Act, *see* 11 U.S.C. § 93j (1976) (repealed), which was virtually identical to the current Code provision. The question whether a "penalty or forfeiture" under the Bankruptcy Act represented compensation for "pecuniary loss" arose only in cases involving sanctions imposed in *civil* proceedings. *See, e.g., United States v. RePass*, 688 F.2d 154 (2d Cir. 1982) (civil penalty under False Claims Act); *In re Abramson*, 210 F. 878 (2d Cir. 1914) (civil penalty under New York Agricultural Law); *Sherwood v. United States*, 228 F. Supp. 247 (E.D.N.Y. 1964) (civil tax penalty). Of course, this focus on civil sanctions was hardly surprising because monetary sanctions in criminal cases, including restitution orders imposed as a condition of probation, were not even considered to be "debts" under the Bankruptcy Act. *See* pp. 9-10, *supra*. There is no evidence in the legislative history of the Code that Congress intended to modify this established practice. Therefore, Code section 523(a)(7) should be given the same limited scope; that is, it should not apply at all to criminal sentences, whatever their terms.

The court of appeals suggested that the State should not be permitted to rely on Code section 523(a)(7) because the State had not filed a complaint under Code section 523(a)(2) or (4) objecting to the respondent's discharge from her debts. (Pet. App. 50A). Those para-

graphs permit a claimant to ask the bankruptcy court not to discharge any "debt" based on fraud or larceny. There are several glaring flaws in the court of appeals' suggestion.

First, the State properly believed that a restitution order does not create a "debt" at all and, therefore, the State had no interest in which of respondent's "debts" would be affected by the discharge.

Second, it would be unseemly to require a state prosecutor to appear as a supplicant in a bankruptcy court in order to ask the bankruptcy judge to honor a prior state court criminal sentence. There is not the slightest hint that Congress intended to distort well-established principles of federal-state judicial comity by imposing such an obligation.

Third, the obligation to defend criminal sentences in bankruptcy courts could impose a substantial burden on the States. Congress did not signify any desire to create such a burden.

Fourth, and perhaps most important, paragraphs (2) and (4) of Code section 523(a) make non-dischargeable only those debts that arise from certain kinds of fraud or larceny. These paragraphs can only apply to civil obligations, not criminal penalties, precisely because they are limited to debts arising from fraud or larceny. The assumption that these paragraphs apply to state criminal sentences would mean that Congress left the States no way in which to preserve restitution orders imposed after conviction for *other* types of crime.

For all these reasons, the provisions allowing bankruptcy courts to decline to discharge certain types of debt must be viewed as dealing solely with civil claims, not with sentences imposed after conviction for fraud or larceny.[3]

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[3] This case does not present the question whether a federal court exercising bankruptcy jurisdiction has the power to enjoin credi-

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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tors from initiating state criminal proceedings for the purpose of evading bankruptcy court jurisdiction and inducing enforcement of a dischargeable debt. *See* 11 U.S.C. § 105 ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of . . . title [11]."). *See generally* 2 *Collier on Bankruptcy* ¶ 105.01, at 105-2 (15th ed. 1985). In contrast to the virtually unanimous view that a criminal restitution order is not a dischargeable "debt," the federal courts appear to be divided on whether a federal court exercising bankruptcy jurisdiction may enjoin pending or threatened state criminal proceedings in those circumstances. *Compare In re Strassmann*, 18 B.R. 346 (Bkrtcy. E.D. Penn. 1982); and *Johnson v. Lindsey*, 16 B.R. 211 (Bkrtcy. M.D. Fla. 1981) *with In the Matter of Davis*, 691 F.2d 176 (3d Cir. 1982); and *In re C. H. Stuart, Inc.*, 12 B.R. 85 (Bkrtcy. W.D. N.Y. 1981).

In light of the established federal policy against federal court interference with state court criminal proceedings, and the limited judicial power of bankruptcy courts, federal bankruptcy courts should have no authority to enjoin ongoing state criminal proceedings. In any event, in the present case, the criminal conviction and sentence *preceded* respondent's bankruptcy filing. There is thus no room for the contention that the State initiated the criminal prosecution for the purpose, much less the "sole purpose," of frustrating the bankruptcy court's jurisdiction. *Johnson v. Lindsey*, *supra*, 16 B.R. at 212. *See* Pet. App. 5A, 24A.

NO. 85-1033

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN J. KELLY, CONNECTICUT
CHIEF STATE'S ATTORNEY, ET AL.,

Petitioner,

V.

CAROLYN ROBINSON,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE, ALABAMA, ALASKA, ARIZONA, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, WISCONSIN, AND WYOMING

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NO. 85-1033

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BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Amici curiae are states, each of which uses different penal sanctions for different cases to enforce its criminal laws. Amici use sentences that include probation, with conditions tailored to the offense and offender. Amici's penal sanctions include, in many cases, requirements that offenders pay sums of money corresponding to victims' losses, as a condition of probation or through other judicial mechanisms.

The characterization of such a condition of probation in such a case as a "debt" dischargeable in bankruptcy is erroneous. It fails to recognize the important function that such sanctions serve in carrying out penal goals of deterrence, prevention, rehabilitation and proportional justice. Amici would be deprived of the flexibility to use the best available penal sanction to fit major categories of crimes, and would probably be forced into the use of sentences of incarceration when that sanction would otherwise be unnecessary, if the result in the court of appeals were to be considered correct.

STATEMENT OF THE CASE

Amici adopt the statement of the case made by Petitioner, the Chief State's Attorney for the State of Connecticut.

SUMMARY OF ARGUMENT

I.

Criminal restitution imposed as a condition of probation is not a mere civil "debt." Instead, it is a penal sanction that the states use to carry out their criminal justice objectives of deterrence, rehabilitation, incapacitation, and proportional justice. The scholarly writings of penologists convincingly demonstrate that the principal advantage of restitution as a criminal sentence is that it enhances rehabilitation by forcing the offender to confront the consequences of his conduct.

The lower court erred in equating criminal restitution with the equitable remedy of "restitution" in civil cases. The two have little in common other than the name. Furthermore, the lower court's analysis of debt as a broadly defined concept failed to recognize that even a broad definition must have limits. Fines, penalties, and even prison sentences may be loosely described as "debts" to society, but they are not dischargeable in bankruptcy. The respondent in this case could have been required to undertake community service that would have been the exact equivalent of the payments required here, yet it would be artificial to hold this sanction dischargeable while the community service would not be.

II.

Discharge of criminal restitution is inconsistent with the "fresh start" policy underlying the Bankruptcy Act. It would leave the states in some cases with no alternative but to incarcerate the bankrupt. Objection to discharge is not a solution Congress could have intended; it would require the prosecution and trial of a second lawsuit after conviction and would neces-

sitate the reassignment of indeterminate numbers of assistant district attorneys as bankruptcy lawyers instead. Furthermore, the Bankruptcy Code does not contain discharge exceptions for every criminal act, and therefore the Court of Appeals' decision, if upheld, would nullify many restitutionary sentences even if the full objection process were pursued. The Act is designed to redress honest business overextension, not to absolve convicted offenders from sentences for their crimes.

PRELIMINARY STATEMENT

Amici curiae will not duplicate Petitioner Kelly's thorough analysis of the case law and statutory text, although amici agree with that analysis and wish to express support for it. Instead, this brief concentrates upon issues of policy.

There have been a number of decisions concerning the issue raised by the case at bar. Virtually all are contrary to the court of appeals' decision in this case, although the court correctly cited one trial court decision that supported its result.[1]

The reason for this near unanimity of opposition to the decision below is well expressed by the concurring judge: the decision amounts to an "unfortunate loophole" that was never intended by Congress and that would, if upheld, "stultify and render useless" criminal restitution sentences. Slip op. at 30. Effective and diligent attorneys would naturally respond to the decision by seeking discharge of conditions of probation throughout the United States. Judges who would otherwise use probation conditions as substitutes for incarceration could not know that this sentence would be valid. That result would mean that

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1 The court, below, correctly stated that "[a] majority of the courts that have considered this issue have . . . held . . . criminal restitution . . . not a debt . . . ." Slip op. at 9. The majority of cases follow *In re Pellegrino*, 42 B.R. 129 (Bankr. D. Conn. 1984), with which the lower court stated it disagreed. *Id.* It said, "The lone exception, so far as we are aware, is *In re Brown*, 39 B.R. 820 (Bankr. M.D. Tenn. 1984)." *Id.* at 12.

the states could not use probation as an effective sanction to enforce their penal laws, and, therefore, many conscientious judges could be expected to use other sanctions instead, including incarceration.[2]

I. THE CONDITION OF PROBATION AT ISSUE IN THIS CASE WAS NOT A MERE CIVIL "DEBT." INSTEAD, IT WAS A PENAL SANCTION USED BY THE STATE TO CARRY OUT ITS POLICIES OF DETERRENCE, INCAPACITATION, REHABILITATION, AND PROPORTIONAL JUSTICE.

At one time, felonies were uniformly addressed by very severe penalties. That approach has given way, today, to more flexible sanctions.[3] Incarceration was used as an early substitute for capital punishment, and, later, probation upon specified conditions was used as an alternative to incarceration. All of these sanctions, however, share common characteristics. They are attempts by the State to carry out its policies of deterrence, prevention, rehabilitation, and proportional justice.[4]

Conditions of probation play an important part in the achievement of these policy goals. Probation for a less serious offense, for example, may carry few conditions other than standardized ones such as reporting and nonviolation of the law. Probation for more serious offenses, on the other hand, may incorporate requirements that force the probationer to confront and appreciate the effects of his criminal act. Thus probation

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2 *See In re Pellegrino, supra.*

3 *Cf. Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (recognizing a "variety of flexible techniques—probation, parole, work furloughs, to name a few"—that are available in non-capital cases). Probation with restitution conditions is a part of that flexible set of sanctions.

4 *See generally* S. KADISH, S. SCHULHOFER, & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES ch. 3 (4th ed. 1983).

may be conditioned upon a brief period of incarceration. Alternatively, it may be made a condition of probation that the offender perform a certain number of hours of community service. Requiring a drunk driver to assist in hospital emergency rooms, for example, may serve policies of general deterrence, specific deterrence, rehabilitation and proportional justice by forcing the offender to confront the consequences of his offense.

1. In many cases, conditions of probation incorporating monetary payments are the superior means of accomplishing the State's penal purposes underlying the criminal law. The State's penal purposes may best be served, in many cases, by probation conditions requiring monetary payments to victims. Such a penal sanction works because it is a deterrent both general and specific; because it has rehabilitative effects; and because it communicates both to the victim and to the society at large that justice has been done. In fact, such victim payment conditions have been supported on the precise ground that they are highly effective in forcing the offender to confront, in the most tangible and measurable way, the harmful consequences of his offense.[5] As such, these conditions may be the best available penal sanctions in some kinds of cases.

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5 For an excellent discussion, see Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 932 (1984).

> [T]he criminal law's main goals are rehabilitation, deterrence, and retribution; consequently, criminal law focuses on punishing and reforming . . . . Although restitution may appear to share with the civil law the aim of compensation, close examination reveals that its principal goal is not its ability to make victims whole, but rather its utility as a corrective device.

Id. at 937.

> Expert authorities express the view that only a minority of victims are benefitted directly by restitution. A condition requiring restitution depends upon apprehension, conviction and offender solvency; logically, therefore, restitution cannot be the basis of a systematic effort to compensate victims injured by persons who after all, more frequently are *not* apprehended. If general compensation is the goal, victim compensation programs of a quasi-insurance

The Court of Appeals gave inadequate consideration to the purposes of the penal sanction at issue. Victim payment programs administered as conditions of probation are important penal sanctions and are worth saving. However, the concurring judge, below, was certainly correct when he stated that this decision will "stultify and render useless" such programs "*as a means of punishing persons convicted of felonies.*" [6]

2. Scholarly analyses of criminal restitution confirm that it is a penal sanction with primary benefits to the offender and

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type can accomplish what restitution cannot. *See* Edelhertz, *Legal and Operational Issues in the Implementation of Restitution in the Criminal Justice System*, in RESTITUTION IN CRIMINAL JUSTICE 63-64 (J. Hudson & B. Galway eds. 1977).

Some experts therefore conclude, often in very definite terms, that a restitution program is actually likely to prove unsuccessful if viewed as having the goal of compensation, and that it will work best if viewed, instead, as effecting a penal sanction having as its goal the reform of the offender. For example, Edelhertz says:

> [T]he [restitution] programs that are actually established invariably focus on correction or rehabilitation of offenders. *No restitution program has come to my attention that had the delivery of benefits to victims as a primary or even very important operational goal.*

Id. While amici curiae may retain differing views of the subject, and would certainly regard as beneficial those compensation effects actually resulting to victims, this conclusion of the expert authorities conflicts sharply with the statements of the court below and further demonstrates the inadequacy of the Court of Appeals' reasoning.

The rehabilitative effects of restitution are borne out by empirical research. Challeen & Heinlen, *The Win-Onus Restitution Program*, in OFFENDER RESTITUTION IN THEORY AND ACTION 151, 155 (B. Galway & J. Hudson eds. 1978) (demonstrating lower recidivism rate for offenders who participated in restitution program). *See also* Note, *Victim Impact Statements and Restitution: Making the Punishment Fit the Victim*, 50 BROOKLYN L. REV. 301, 312-13 (1984).

6 Slip op. at 30 (emphasis added). The concurring judge's recognition that restitutive payments are not primarily compensatory, but rather are a "means of punishing persons convicted of felonies," supports the conclusion that they are a penal sanction rather than a debt.

to society as a whole. The following list includes some of the recognized benefits of criminal restitution:

1. Restitution is more rehabilitative than other correctional measures.[7] One reason is that it is rationally related to the harm done and thus is perceived as more just by the offender.[8]
2. Restitution is seen by the offender as specific to the criminal act.[9] This perception also increases its rehabilitative effect.
3. Restitution allows for a clear sense of accomplishment as the offender completes concrete requirements.[10]
4. Restitution requires the offender to be actively involved in the program of reform.[11]

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7 *See supra* note 8.

8 Galaway, *Toward the Rational Development of Restitution*, in RESTITUTION IN CRIMINAL JUSTICE 82, 83 (J. Hudson and B. Galaway eds. 1977) (hereinafter cited as Galaway).

The great majority of states view restitution as a method of rehabilitating the offender. Baker, *Restitution for Crime Victims: The California Legislature Responds to Proposition Eight*, 14 SW. L. REV. 745, 749 (1984).

9 *Id.* In fact, at least one scholar has proposed the creative use of criminal restitution in which the restitutionary act is related to the destructive act. For example, one found guilty of vandalism would be ordered to clean the site vandalized. Eglash, *Creative Restitution*, 48 J. CRIM. L. & POL. SCI. 619, 622 (1958). Although this proposal would be difficult to administer, it forcefully demonstrates the rehabilitative goal that underlies all forms of restitution. Further, it shows how artificial it is to label criminal restitution a "debt" merely because it uses payment to confront the offender with his crime.

10 *Id.*

11 *Id.* Casson, *Restitution: An Economically and Socially Desirable Approach to Sentencing*, 9 NEW ENGLAND J. OF CRIM. & CIV. CON. 329 (1983) (hereinafter cited as Casson).

5. Restitution provides a socially appropriate way of expressing guilt and securing a sense of atonement.[12]
6. Through restitution, the offender is likely to elicit a more positive response from persons around him than the offender sent to prison or receiving some other sort of sanction.[13] Thus, it enhances self-respect.
7. Restitution reduces demands on the criminal justice system. Restitution programs are less expensive to operate than prisons and, if properly managed, they help pay their own operating expenses.[14]
8. Restitution reduces the need for vengeance in society, because offenders are perceived as responsible persons taking active steps to make amends for wrongdoing.[15]

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12 There are two ways an individual can alleviate the guilt he feels when he hurts others: through restitution or through justification and denial of responsibility. Macauley and Walster, *Legal Structures and Restoring Equity*, in CONSIDERING THE VICTIM 291 (J. Hudson & B. Galaway eds. 1975). *See also* Casson at 383-384. Restitution thus provides a constructive outlet for guilt.

13 Galaway at p. 83; E. ZEIGEN HAGEN, VICTIM, CRIME AND SOCIAL CONTROL 44 (1977).

14 Galaway at p. 83.

15 *Id.* The reduction-of-vengeance factor has been described in this way:

> The [criminal] punishment, proportioned to the harm, is emotionally felt as compensation for the public damage done. The public, so to speak, takes its pay in the pelt of the offender himself.

Hall, *Interrelations of Criminal Law and Torts*, 43 COLUM. L. REV. 753, 775, 967, 969, 971 (1943). *See also* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 932, 941 (1984).

9. By ordering restitution, a court forces the defendant to acknowledge in concrete terms the harm he has caused.[16]
10. Because restitution is less restrictive of liberty than is imprisonment, but graver than probation, it bridges the gap between traditional sentencing alternatives.[17]
11. Restitution impresses upon the offender his responsibility to others.[18]
12. Restitution is an effective deterrent.[19]
13. When restitution is ordered as an alternative to incarceration, it allows the offender to support himself and his family and it saves the state anywhere from $10,000.00 to $20,000.00 in annual confinement expenses.[20]

The historical origins of criminal restitution also demonstrate that it is a penal sanction.[21] Initially, restitution was designed to benefit the offender rather than the victim in that it was the means whereby the offender and his kin group made amends to

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16 Note, 97 HARV. L. REV. at 938.

17 *Id.*

18 *Id.*

19 *Id.* at 939.

20 The importance of restitution as an alternative to incarceration cannot be overemphasized. If the decision of the court of appeals is upheld, courts may be forced to order incarceration in cases in which restitution would otherwise have been used. The consequences to society would be severe. The most obvious result is the cost: It costs a great deal to support a person in prison when, on the other hand, he could not only be making restitution for his criminal actions but also supporting himself and his family. Casson at 352.

21 Note, 97 HARV. L. REV. 932, 933 (1984).

the victim and his kin group and thus avoided a more severe sanction which the victim's kin group could legitimately impose. The primary purpose of restitution, historically, was not to compensate the victim, but to protect the offender from violent retaliation by the victim or community. Therefore, the focus was on the offender.[22]

In our modern society, the focus of restitution is still on the offender.[23] Many statutes specify that restitution should only be ordered if it will promote deterrence or the offender's rehabilitation.[24] In contrast, in the civil context, courts ordering restitution do not consider its impact upon the defendant. Furthermore, civil damages allow recovery of full compensation for mental anguish, pain and suffering, and other real losses, which criminal restitution in most states does not attempt to provide.[25]

3. The lower court confused the law by equating the equitable remedy of civil "restitution" with the entirely different

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22 Jacob, *Reparation or Restitution by the Criminal Offender to His Victim: Applicability of an Ancient Concept in the Modern Correctional Process*, 61 J. CRIM. L. 152, 154-55 (1970).

23 In ordering restitution, courts assess a wide range of factors relating to the offender's personal characteristics and degree of culpability. Most courts recognize that a defendant who is ordered to pay an amount beyond his financial ability will experience frustration that may adversely affect his prospects for rehabilitation, so they adjust the amount of restitution to the offender's ability to pay. Note, 97 HARV. L. REV. at 939-40.

24 *E.g.* Ark. Stat. Ann. 41-1201(d) (1977); N.J. Stat. Ann. 2C:44-2a(2) (West 1982). Note, 97 HARV. L. REV. at 939.

25 In the criminal context, restitution generally is limited to the actual damages directly caused by the crime. Victims do not receive recompense for pain and suffering and loss of earning capacity. Although this limitation may result in less than full compensation of the victim, one commentator has said "it may well promote the offender's reform. When the defendant believes the amount of the award is fairly related to the damage he has caused, rehabilitation is more likely." Note, 97 HARV. L. REV. at 941.

criminal sanction of victim "restitution." The Court below erroneously reasoned that victim "restitution" payments required as a condition of probation by a criminal court are equivalent to, and a subclass of, equitable "restitution" remedies of the kind that might be ordered by a civil court.[26] This reasoning was superficial and serves only to confuse the issues. There is in reality no relationship between equitable "restitution" and victim "restitution" as a penal sanction, except for the name.

Equitable restitution is a remedy distinguishable from compensatory damages, punitive damages, and specific performance, in that it influences the way in which a civil court may compute the civil measure of recovery upon which the plaintiff may levy execution.[27] Probation conditions are entirely different, may be measured in ways unrelated to equitable measures, may not provide for full payment of the victim's loss, may take into account the wage earnings of the offender, may involve a schedule tailored to his abilities, and, in short, may be tailored to serve the objectives of a criminal, penal sanction, rather than the rigidly defined individual remedy that a private creditor would have in a civil court in collecting a "debt."[28]

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26 The court said, for example, that it saw no indication "that Congress intended some rights to restitution but not others to be within the definition of claim." Slip op. at 14. This reasoning fits civil restitution, in which there is a "claim," but it does not fit a judgment of probation, to which the victim is not a party and obviously does not present a "claim."

27 *Cf.* K. PARKER, MODERN JUDICIAL REMEDIES 12, 27-35 (1975).

28 In fact, Robinson was required to pay $100.00 per month. The total amount she would pay over the five-year probationary period was $5,800.00, and this amount would be considerably less than the $9,932.95 stolen by her. *See* Brief of Petitioner, Statement of the Case.

This flexible probation order is consistent with the use of the penal sanction. Conn. Gen. Stat. Ann. sec. 53a-30(a)(4) (West Supp. 1985) empowers the trial judge to take account of the offender's circumstances and ability "to pay" and gives him broad discretion in doing so.

4. A penal sanction such as a prison term, community service, or a condition of probation requiring payment, may informally be characterized as a "debt to society," but it is not thereby transformed into a debt dischargeable in bankruptcy. In its reasoning, the Court of Appeals considered only that authority under the Bankruptcy Act that requires the "broadest possible" interpretation of "debt," and the Court failed to consider that even a broad definition has limits at some point. For example, a person sentenced to a prison term is accurately (if informally) said to have a "debt" to society, but it would make no sense to regard that sentence of years in prison as a "debt" dischargeable in bankruptcy.

Similarly, community service might loosely be called a "debt to society." In the present case, for example, Carolyn Robinson might as appropriately have been sentenced to spend several hundred hours of community service to the benefit of public welfare recipients, and that obligation (in theory) could be made to be the precise equivalent, in effort and in effect, of the probation condition in the present case. yet it clearly would not be a "debt" for discharge purposes.[29] Likewise, some States would require a person in Robinson's position to pay a penalty into a common fund for general victim compensation; such a payment would be, metaphorically, a "debt" to society, but it would obviously not be a debt subject to bankruptcy discharge.[30]

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29 Such a sentence, however, would be inferior, in many instances, to probation with a condition requiring restitution. For example, it often would interfere with the duties of the offender in keeping custody of his or her children.

30 Criminal restitution is "a constructive alternative to the severity of imprisonment and the leniency of probation." Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 932 (1984). "The sanction can take a variety of forms. A court may order an offender to pay money directly to the victim, to participate in a work program in which a portion of his salary is paid to the victim, to render services to the victim, or to work for the community in lieu of repayment of the victim." *Id.* at 933.

Each of these sentences would share, in common with the condition of probation at issue here, the characteristics of a penal sanction, designed to further goals of deterrence, prevention, rehabilitation and proportional justice. The use of a simplistic definition of "debt," such as that used by the court below, would undermine the State's criminal justice system by precluding the use of what are not debts at all but penal sanctions. This result would be equally irrational in these examples and in the case at bar.

Connecticut's primary goal in this case is not the collection of $9,932.95 as a civil "debt." Instead, Connecticut seeks to reduce theft in the future, by Carolyn Robinson and others, by vigorous prosecution followed by appropriate sanctions that carry out the State's policies of deterrence, prevention, rehabilitation, and justice. That result cannot follow if Robinson keeps the money she has stolen and has the sanction of the law in doing so. The $9,932.95 is a necessary but incidental consideration in that larger purpose, for which Connecticut would undoubtedly be willing to spend much more than $9,932.95.

II. THE "FRESH START" POLICY OF THE BANKRUPTCY ACT IS NOT SERVED BY FORCING CONNECTICUT INTO A SITUATION IN WHICH IT HAS NO ALTERNATIVE BUT TO INCARCERATE THE BANKRUPT.

This Court has described the purpose of the Bankruptcy Act as follows: [31]

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31 *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934).

It has also been suggested that discharge "liberates the bankrupt psychologically." Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C. L. REV. 723, 726 (1980). But since the very purpose of restitution is for the offender to be psychologically liberated by making amends for the crime, the court of appeals' decision also contradicts this policy.

> "One of the primary purposes of the Bankruptcy Act is to 'relieve the *honest* debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' This purpose of the Act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the *honest* but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting *debt. The various provisions of the Bankruptcy Act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act.*" (emphasis added).

Respondent is not seeking to be released from "the pressure and discouragement of preexisting debt" incurred through "business misfortunes." Furthermore, it is inconceivable that Congress, in enacting the Bankruptcy Code, intended for state criminal justice systems to comply with all the procedures that unsecured creditors have to comply with, in order to receive criminal restitution ordered as part of a penal sanction after conviction.[32] The

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32 The court of appeals suggested, erroneously, that the State could prevent this result by objecting to discharge.

That solution would require that the State reassign large numbers of assistant district attorneys to serve, instead, as bankruptcy lawyers. "Objecting" to discharge, and doing so effectively, is a complex procedure, equivalent to a civil suit. It requires a complaint; attendance at creditors' and various other pretrial meetings; discovery; a pretrial order; and, as in any other civil suit, proof by the objecting party of its grounds at a trial. It is possible that the State could be denied the benefits of offensive collateral estoppel,

court of appeals' decision places bankruptcy courts in direct conflict with state processes for criminal justice.[33]

The basic policy of the Bankruptcy Act is to provide a "fresh start" to persons who have, through inadvertence, become overextended.[34] "The Bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial overextension."[35] The decision below will defeat that very policy of "fresh start" by forcing Connecticut and other States into harsher alternatives.

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see Haring v. Prosise, 103 S.Ct. 2368 (1983), and therefore it could be faced with the requirement that it prove the elements of the crime all over again, as well as the amount of restitution.

Furthermore, objecting to discharge would be ineffective if the offense did not fit the categories of crimes for which discharge can be prevented. For example a person who committed a reckless assault and caused severe personal injuries to another individual would be immune from objection and could avoid a sentence of restitution by bankruptcy.

Finally, the "objection" procedure assumes a need for case-by-case determination of the existence of the underlying crime. That effort is unnecessary, and Congress certainly would not have intended to require it, when the entire category of sentences sought to be discharged has already, by definition, been judicially determined to involve criminal offenses.

33 The court of appeals here has violated the "long-standing tradition of restraint by federal courts from interference with traditional functions." *See Younger v. Harris*, 401 U.S. 37 (1971); *Perez v. Ledesman*, 401 U.S. 82 (1971); *In re Pellegrino*, 42 B.R. 129 (1984). This is particularly true of state criminal proceedings, such as the Connecticut criminal proceeding in the instant case. *In re Pellegrino*, 42 B.R. at 134; *Barnette v. Evans*, 673 F.2d 1250 (11th Cir. 1982).

34 *Perez v. Campbell*, 402 U.S. 637 (1971) (expressing fresh start doctrine); *see also* 3 L. KING, COLLIER ON BANKRUPTCY para. 525.02 (15th ed. 1985).

35 *In re Pellegrino, supra.*

Connecticut simply cannot surrender its interest in deterrence, prevention, rehabilitation and proportional justice. Occasional miscarriages in individual cases, in which these goals may fail of achievement, might be tolerable; but systematic failures, in which major categories of offenders achieve virtually complete immunity from any penalties whatever upon conviction, are not. Thus the question raised by the decision below, and it is a substantial one, is: What is Connecticut to do in the cases of future Carolyn Robinsons?

If deprived of the ability to use conditions of probation to achieve its valid penal objectives, the State of Connecticut may be forced into a situation in which it has no alternative but to incarcerate persons in Carolyn Robinson's position. The resulting deprivation of freedom may be more harsh for them and may require the State to make arrangements for their dependents that will be inferior to allowing them to keep them while on probation. In addition, the alternatives may be less appropriate to the achievement of the State's legitimate penal objectives than probation with appropriate conditions. Nevertheless, the State's interest in the integrity of its penal sanction is so fundamental that it will be forced to use more harsh, and less useful, alternatives if deprived of the middle ground by decisions such as that of the court below.[36] This result is inconsistent with the "fresh start" policy underlying the bankruptcy act.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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36 The holding below transforms what Respondent has done into the perfect crime. Connecticut clearly cannot afford to foster an atmosphere in which welfare theft, followed by conviction coupled with bankruptcy discharge, is perceived as the perfect crime. It will have no choice, if that happens, but to resort to the more severe and less appropriate sanction of imprisonment.

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